No 36

A MANUAL

OF

JURISPRUDENCE FOR FOREST OFFICERS:

BEING A TREATISE ON THE FOREST LAW,

AND

THOSE BRANCHES OF THE GENERAL CIVIL AND CRIMINAL LAW WHICH ARE CONNECTED WITH FOREST ADMINISTRATION;

WITH A

COMPARATIVE NOTICE OF THE CHIEF CONTINENTAL LAWS.

BY

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OF THE BENGAL CIVIL SERVICE.

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NOTE ON THE COURT-FEES ACT.

NOTICE AS TO ABBREVIATIONS.

In order to save space and avoid the repetition of long titles, I shall quote the following works to which allusion will repeatedly be made, by the Author's name or short title only :—

Manwood ... A treatise of the Laws of the Forest, &c., *collected as well out of the Common Laws and Statutes of this Land; as also out of sundry learned ancient Authors and out of the Assises of* Pickering *and* Lancaster (first published about 1598) 3rd edition, London, 1665.

Markby ... Elements of Law; with a Supplement (2nd edition) Clarendon Press series (Macmillan, 1874).

Cooke ... Cooke's Wingrove on Enclosures, 4th edition (London, 1864).

Williams ... (Joshua, Q. C.) Rights of Common and other Prescriptive Rights (London, 1880).

Roth ... (Dr. Julius) Handbuch des Forstrechts, &c., nach den in Bayern geltenden Gesetzen. (München, 1863.)

Eding ... (H.) Die Rechts Verhältnisse des Waldes (Berlin, 1874).

Pfeil ... (Dr. W.) Anleitung zur Ablösung der Waldservituten 3rd edition (Berlin, 1854).

Qvenzel ... Rechtskunde für Forstbeamte im Königreiche Sachsen (Dresden, without date) and Nachtrage, or Supplement to this.

von Berg ... (H. G. E.) Die Staats-Forstwirthschaftslehre. (Leipzig 1850.)

Grabner ... (L.) Die Forstwirthschaftslehre. Vienna, Wessely, 1866, 3rd edition.

Meaume ... Des droits d'usage dans les Forêts (a Commentary on the Code Tit. III, sec. 8), 2 vol. Paris, A. Durand 1851.

Dalloz et Meaume ... Article "Usage"—"Usage Forestier" from the Répertoiré de Législation (Jurisprudence Général). Reprinted Nancy, 1861.

Puton, A ... Manuel de Législation Forestière (Paris, A. Coin. 1876). (Manual of the Forest School at Nancy.)

NOTICE AS TO ABBREVIATIONS—*continued.*

Code Forestier ... Code Forestier avec exposé des motifs par M. Brousse, sous la direction de M. Le Baron F. de Langlade. Paris, Chas. Béchet, 1827. And a small pocket edition of the Codes, published at the Bureau of the Revue des Eaux et Forêts, Paris.

Curasson ... Le Code Forestier conféré et mis en rapport avec la Législation, &c., 2 vols. (Paris, 1828.)

The "Kanara Case" is the case *Bháskarápp*a versus *the Collector of Kanara* —reported in the Indian Law Reports, Bombay series, Vol. III., pp. 452—785.

INTRODUCTION.

In the explanatory introduction, which I prefixed to my Land Revenue Manual, I called attention to the fact that a Forest Officer often had occasion to regard the estates under his charge, not wtih reference to the forest sciences involved in their management, but from a point of view entirely different. He had to look on them as 'pieces of property,' of a particular kind.

In that aspect, they were found to stand in certain relations to the district administrative system, to the Land Revenue Law, and to certain branches of the general law. It was, therefore, necessary that within definite limits, the officer in charge of a forest division should understand these subjects.

As regards the Land Revenue branch, I have endeavoured to facilitate the Forest Officer's study by my "Manual of Land Revenue systems and Land tenures." It remains now to offer him a Manual dealing with those branches of general law, both civil and criminal, which also directly bear upon the administration of forest property.

The selection of subjects to be so treated, has been based solely on a consideration of the practical requirements of a Forest Officer. The chapters are, therefore, necessarily fragmentary and disconnected. It would not, at any rate in the present condition of things, serve any useful purpose to attempt a complete and symmetrical 'schema' of jurisprudence, commencing with a classification of laws, of rights and obligations. Nor would it be useful to go consecutively through all the various branches of positive law: I have to bear in mind that the student is a forester, not an attorney-at-law.

A few lines will then be required to explain why the legal topics discussed in this Manual, have been selected.

In the practical business of a forest office, whether as regards the estates or their produce in transit, few terms are more constantly found to come into use than the terms 'property' and 'being in possession.' It is natural, therefore, to commence by offering a brief explanation of what is meant by 'property,' how it is acquired, and how 'possessed.'

Then, again, a forest is a sort of property in which different kinds of interests may co-exist. The forest *A* is the property of Government: nevertheless *B*, as resident of a certain neighbouring village, has a right, say, to graze 20 cows during the rainy season, in the forest. We shall do well to be quite clear about the nature of the *owner's right*, and that of *B* as "*right-holder*." Having gained these elementary conceptions of "property" and of "rights" (servitudes), our notice will at once be attracted to the fact that in all civilized countries where large natural forests exist, it has been found advisable to put those estates under the protection of a special 'forest' law. That law, in fact, protects the forest by special rules, over and above those general rules of civil and criminal law by which all property is ordinarily protected. Not only so, but the special law continues to apply its provisions to the material taken out of the forest, long after it has left the forest itself. A large portion of our task will therefore be, to understand the principles on which this special law proceeds.

This done, we shall examine successively the details of Forest law. First, we have the constitution of forest estates, which is, in fact, the determination of the limits within which the special protective rules will operate; the investigation into, and definition of, the rights which exist within those limits; the regulation of the exercise of rights which are maintained, and the method of buying out or getting rid of such rights as are capable of being so dealt with. Next comes forest police, that is to say, the prevention and punishment of offences affecting the forest, and its

produce when in transit. Lastly, there are various general administrative provisions regarding the Forest Service.

As the infringement of the law for the protection of forests will render a trial before a Magistrate necessary, our next study will be the general principles of Criminal Procedure.

As regards the small part of the book which remains after this, the only description I can give of it is, that it is intended to consist of practically useful fragments of Civil Law and Procedure.

Forest Officers, for example, have constantly to enter into contracts, on behalf of Government, for work to be done or materials to be supplied; and they will doubtless be glad to have some idea of the contract law; though as this branch of law is extensive and has many recognised sub-divisions, I can only select just those principles and topics which are necessary, and which will serve as landmarks to the forester, and to keep him safe from any grave mistakes in his dealings with contractors.

As the forester may have to go to court in some cases connected with these matters, or may require to sue and be sued (on behalf of Government) in connection with claims of various kinds, it will further be necessary to explain to him the outlines of Civil Procedure.

Lastly, a brief notice of the dry but indispensable Stamp and Registration laws must be given, since a Forest Officer has often to execute contracts or receive security bonds and other documents which may require to be stamped or registered, or both.

I think, on the whole, that a student perusing this catalogue of the work before him, will feel that it does not go beyond what is necessary; at the same time, it does not seem a hopeless or even a formidable task for him to master the subject of "Law" within such limits.

B. H. BADEN-POWELL.

ERRATA ET ADDENDA.

Note.—The student is requested to correct for himself several instances in which a *French* accent has been omitted or misplaced. The difficulties of Indian typography have prevented uniform accuracy in this respect. Read always *défens, défensable, récolement, redevance,* &c., &c., for *rédevance, recolement, defens,* &c., &c.

PAGE 77, note, last line but one, *for* "Annoteés" *read* "annotés."
„ 83, note, *for* "Traité Générale" *read* "Traité de Sylviculture Générale."
„ 86, line 25, *for* "indivis" *read* "indivises."
„ 108, line 19, *for* "Ertragsfahigkeit" *read* "Ertragsfähigkeit."
„ 109, line 13, *for* "exercis" *read* "exercice."
„ 109, note, line 3, *for* "Bürgerlicher" *read* "Bürgerliches."
„ 114, line 29, *for* "some" *read* "so we."
„ 118, note, *for* "einkommen" *read* "Einkommen."
„ 123, note, *for* "Bürgerliche" *read* "Bürgerliches."
„ 138, line 9, *for* "Forestiére" *read* "Forestier."
„ 162, note, *for* "p. 132" *read* "p. 102," and *for* "schädligsten," &c. *read* "Schädligste von allen Waldservituten."
„ 219, note (last line), *for* "Dortschaft" *read* "Dorfschaft."
„ 235 (line 4 and note), *for* "indivis" *read* "indivises."
„ 246, *add* as a note—

"The law has since been passed: the text may be found in the Revue des Eaux et Forêts (Répertoire, Vol. X, page 51) for April 1882, and the rules for carrying out the law, in the same journal (page 134) for August 1882."

PAGE 250, note, *for* "Forst" *read* "Forstes."
„ 256, line 5, *for* "spurs" *read* "ledges."
„ 256, line 10, *for* "affaisement" *read* "affaissement."
„ 269, note, *for* "as far as *white* ants are concerned" *read* "as regards white ants (which are not really ants at all) and"
„ 436, note, line 9, *for* "domiciliare" *read* "domiciliaire."
„ 498, line 5, *for* "denied" *read* "decreed."
„ 503, line 3, *for* "non-registration of documents" *read* "non-registration. Documents"

A MANUAL OF JURISPRUDENCE

FOR

FOREST OFFICERS.

CHAPTER I.

GENERAL NOTIONS REGARDING PROPERTY.

SECTION I.—OF PROPERTY AND ITS ACQUISITION.

§ 1.

IF we were to pursue the regular method of studying jurisprudence adopted in some of the old established forest schools of the Continent, we should first make a general survey of the whole system of Civil Law comprised under the great heads of the law of *Persons* and the law of *Things*.

I do not propose at present to attempt so much. I confine myself to a single topic of the general *law of Things;* but it is one which is constantly referred to in books and in conversation, and is indicated by the term "Property."

The Indian student, even if he has not reflected on the meaning of the terms, must often have heard such a phrase as—"This forest is the *property* of Government, but such and such villages or individuals have *rights in* it." Here he is introduced to a case where the "property" resides in one person, but the full enjoyment of it

is restrained by the existence of some "rights" residing in another person. Equally familiar are terms implying a *difference of kind* as regards property. We have often heard people speak of "movable" property and immovable; of land that is "ancestral" or "acquired." And I might easily, if it were necessary, multiply illustrations of the variety of ways in which we speak of "property,"—indicating by our phraseology certain peculiarities connected with the legal idea of ownership, which perhaps we do not very clearly apprehend. Therefore it is well that we should understand some, at least, of the leading ideas involved in, or connected with, the word "property."

§ 2.

At the outset I wish to deprive this term of an ambiguity which, in its popular use, attaches to it. It is used to signify both the thing owned and the right of ownership: my house is my "property" and I have a right of property in it. I shall avoid confusion by uniformly using "property" when I mean the *subject* of the right, and "ownership" when speaking of *the right* over it.

§ 3.

Property is variously classified in different systems of law. In England we have "personal" and "real" property. This is a historical distinction based on old customs, and now interwoven with our legal system, but is not one which has either philosophical precision or practical advantage. In India we have "movable" and "immovable"—a division which only partially corresponds to the English[1].

It is this division that the Indian official is chiefly concerned with. Immovable property is understood to be,—land, benefits to

[1] And we may have other classifications for special purposes. Thus, the Hindú law treats "ancestral property" (*i.e.*, property handed down in the family from ancestors) somewhat differently from "acquired property," that is, property which a man has himself made, produced or acquired.

arise out of land, things attached to the earth, or permanently fastened to things attached to the earth[2]. Movable property is, of course, all property that is not immovable[3].

Either kind of property may be a tangible object—a house, a log of wood, a field, &c.—in which case it is said to be "corporeal," or it may be a thing which has a non-physical existence only,—a right to receive rent, or to succeed to an estate, or a bond or promise to pay money; in which case it is "incorporeal."

§ 4.

In some respects this classification into movable and immovable is traditional, and has grown up by custom. But in others it is based upon real convenience. The difference is important, chiefly with reference to the manner in which either kind can be transferred and alienated. The more permanent a thing is, the more its transfer ought to be secured against mistake and fraud. The transfer of land and buildings may affect other persons besides the immediate parties, whereas the sale of a horse or a book can hardly do so[4].

[2] See General Clauses Act (Act I of 1868), section 2.

Trees as yet uncut are immovable property, even though marked for felling or girdled and killed on purpose to be cut. Fruits ungathered are also immovable. It is possible, however, to commit a "theft" of standing trees or fruits, &c., under the Penal Code, because, though the definition of theft (section 378) applies to *movable* property, yet the first explanation to the section says that this class of things (*viz.*, those attached to the earth) becomes the subject of theft the moment they are severed; and a second explanation adds that a moving which effects the severance may be a theft.

[3] The French law (Code Napoleon, A.D. 1803-4) also classifies property into movable and immovable, but admits some curious differences from our law. For instance, section 524 says that "things which an owner of the estate has placed there for the service and working of the estate are, by their destination, immovable," and hence plough cattle, agricultural implements, tools for cultivation or gardening or for the use of forest guards lodged in a (Government) forest-house, such as well ropes and buckets, &c., are all immovable property (Meaume, Introduction à l'étude de la Legislation, &c., Nancy, 1859, page 9). None of these things would be immovable by our law.

[4] We also apply different names to transactions regarding property, according as it is movable or immovable. We often call a sale of land a "conveyance;" but we should not apply this term to the sale of a cow or a watch. The term "mortgage" is not applied to goods; in such a case we speak of a "pledge" or "pawn."

In many parts of India also the sale of land in execution of decrees is hedged round with obstacles, because the land is the man's life: if he loses that, his family is broken up. I shall have to recur to this subject later, so here I at once pass on to enquire what is "property"? and what are the ideas which are involved in the term?

§ 5.

First let us notice that a thing (whether movable or immovable) does not become "property" till it "belongs to" some one, or is in some one's hands. The most splendid diamond may be lying somewhere at the bottom of the Atlantic Ocean, but you would hardly call it a piece of property. Land far away, say in the interior of Australia, is not as yet any one's "property." There must be the *acquisition* of the thing by some one or more persons (jointly perhaps) before it is "property." How then is property acquired?

§ 6.

In the present state of things by far the most ordinary method of acquisition is by some form of *transfer*. The present owner has got it by *inheritance* from his deceased relation; he has got it as a *gift*, or by *exchange*, or by a *sale*, or he has it on a *lease*, or pursuant to a *mortgage*, *i.e.*, a temporary title which is given him as security for some loan or other benefit.

§ 7.

Nevertheless there are still some methods of acquiring property which do not involve one or other of these kinds of *transfer*. For instance, I make a table or a chair, or weave a piece of cloth, and it is mine, because I made what is, in fact, a "new species," a thing different in kind as well as in value, from the mere unwrought log or skeins of thread, out of which the finished articles were made[5].

[5] I only state this generally, for there are modifications of the rule when applied to practice (Institutes of Justinian Lib. II, Tit. I, § 25). So the Indian Forest Act defines timber to *include* cart-wheels, canoes or other articles formed out of timber. A person brought up for stealing timber could not plead that the canoe or the cart-wheel, though made out of the stolen timber, was a "*nova species*" and not the timber itself, and, therefore, he could not be indicted for stealing timber.

§ 8.

Then, again, there is the principle of "accession" or "adjunction." I have a mango tree and the fruit (accessory) is mine, because the tree is, or I have a cow which bears a calf. A similar principle applies where land is gradually washed up by a river and added on to my estate.

On the principle of the owner of an estate, owning also the accessions, the English law maxim is that an owner of an estate owns everything up to the sky above and down to the centre of the earth[6]. This gives him, as part of the estate, the grass, the trees, the soil, the stone, and even the mines underneath it; and this maxim holds good generally, *i.e.*, unless a special law prescribes otherwise. This principle could not, however, be claimed as applicable to India, at any rate outside the Presidency towns; proprietary right is here dependent, not on the maxims of English common law, but on the ancient customary law of the land, and on the declarations of the local law, or the extent of right admitted or recorded at a Land Revenue settlement. The right of the Government or of private owners to mines and minerals will be discussed more fully in the Chapter on Government property which follows.

§ 9.

A case arises on this principle, which may not unfrequently come under a Forest Officer's notice—the erection of buildings of a permanent character on land. On the general principle of adjunction, the building follows the land. But this principle cannot be applied universally: the circumstances under which the building has been put up may be very different, and the rule applicable may differ accordingly.

For example, if without my permission or knowledge you build a house on my land (knowing that it is mine) the house

[6] Cooke, page 65.

becomes mine, unless, under the special circumstances, it may be equitable that I should pay you the value of the materials, or allow you to pull down the house and take the materials away.

If you build on my ground, and I stand by and do not warn or prohibit you, then I am taken to consent, and the house is consequently yours; though, by some systems of law, I should be entitled to compensation for the ground (so in the Prussian law). In India, rent would probably be allowed to the land-owner for the use of the ground in such a case.

But, supposing you were in possession of the land and believed it to be yours, though I am the real owner, and afterwards establish my right. Here the house is mine, because the land is; but you, the builder, would be entitled to recover the cost of the building, or to be allowed to pull down the house and remove the materials. I may add that in all these cases the precise facts of the case have to be considered, and in India the fact of the house being of mud ("kachá"), or of masonry ("pakká") would often affect the precise relief which a court would grant[7].

A similar case may occur in planting. As soon as trees or plants have taken root they are held, by all systems of law, to form part of the estate.

In the Prussian law, if the planter have sown or planted in good faith, and the land-owner is satisfied to keep the trees or plants,—in other words, recognizes that he has been benefited by the act, he has to pay the actual expenses of planting, and the trees become his; should he not want the trees (as if he wish to plough up the land) then he is not bound to compensate, but the owner may still take away the trees, if it is possible to do so without injury to the estate. This seems fair and equitable.

[7] There is a leading case about this in the High Court of Calcutta, reported in the Weekly Reporter, Volume VI, p. 228 (also in the Supplementary Volume to the Bengal Law Reports (Full Bench, p. 595), see also Punjab Record for 1878 Case (Civil) No. 53.

§ 10.

There may be also the case in which a thing may be acquired, because no one else wants it, or has a better right to it than the present holder.

For instance, I catch a fish in a river, or a wild animal in a waste (to which no one claims a right); when captured, it becomes mine. I may find something which has evidently been thrown away and abandoned by the owner, and I may take it if it is of use to me. I may find a piece of money or a jewel, which was evidently not intentionally thrown away or abandoned, but still it is mine, if, after using due diligence to find an owner, I fail to do so, and in fact no one with a better claim comes forward[8].

It is on this principle that "waif" rights exist on our rivers. If a log cannot be identified and is washed up or taken to the shore, it belongs to the lord of the land[9].

§ 11.—*Acquisition by Prescription.*

Lastly, it may be difficult to say how I got the land or the thing I at present own. Or, it may be that I got it originally by some method to which I can easily refer, such as sale, or under a will, but the sale or will was in itself informal or invalid: nevertheless, I have since had long, open, and peaceable, possession of the property *as my own;* and in that case the law will not allow my possession to be disturbed. I am then said to have acquired the property by *prescription.*

[8] When a man finds a *buried* treasure (*i.e.*, anything "hidden in the soil or in anything affixed thereto") exceeding in value 10 rupees, by our law, the property is called "Treasure-trove," and is subject to the provisions of Act VI of 1878. This would not apply to anything not hidden, but found on the surface. I might pick up a diamond ring in the road, and it would not be subject to this Act. On finding an article it is, however, necessary not to infringe section 403 (explanation 2) of the Indian Penal Code, by neglecting to try and find an owner. *See* also Act IX or 1872 (Contract Law), sections 168—171.

[9] I use this phrase, because, usually in India, the waif does not belong to the actual owner of the land at the spot it is found, but to the Government or Chief or Prince of the territory within which the waif is found. The principle, however is the same, whatever may be the custom of the locality.

§ 12.

And this is the principle which has to be called in *to account for the first institution of property.* It is true, as I previously observed, that property is generally acquired at *the present day* by some form of *transfer.* That is because, in our present condition, in a moderately civilized country, most things that are fit to be made property, have, for generations past, been owned by some one. But if we go far enough back, there must ultimately come a time when the property was *not* owned. Take for example a field which is your property. You got it, say, by inheritance from your father, and he from his father, and so on for generations back, till at last we come to the time when some remote ancestor simply seized the land, or something of the kind, and, having got it, he remained in possession ever since and left it to his descendants. And now the *feeling* of every one is, that after such a length of time, the possession ought not to be disturbed. The old Roman law first of all recognised this principle of *prescription,* and all other systems of law here have in one way or another followed it. The lawyers are, however, unable to explain *why* a man who has held a thing peaceably and openly as his own for a long time, should be held to have a 'title' to it, and ought not to be disturbed. It will be well if we take a brief survey of what they have to tell us on this subject. The old lawyers tell us that the thing was originally "nobody's goods" *res nullius* [10], and that the person who first took and suc-

[10] The Roman lawyers developed the idea of "*res nullius*" as usual with much clearness, and one of their developments in this respect has led to important consequences. Wild animals, precious stones or metals newly dug up, things abandoned, lands newly discovered and never before possessed,—these are all readily intelligible instances, included in their definition; but they further added to the list "*the property of an enemy.*" They held, in fact, that on the outbreak of hostilities, possession and its rights were upset, and things reverted to a "state of nature;" that the successful captors became owners as if they had landed on a new and ownerless continent. Custom in such cases regulated the question whether the individual captor or the tribe or clan at large was considered entitled to the ownership. At an early period it became the rule among the Romans that the land became the property of the State, not of the individual captor, and the State disposed of it accordingly. This curious extension of the idea of *res nullius,* has been the origin of all our modern international law regarding capture in war.

cessfully retained, possession, became owner by natural law, or got a "title by occupancy[1]."

Blackstone also reminds us that there was a time when everything in the world was "nobody's goods." The Creator, says this author, gave over the earth and its products, ready to the hand of man, and the first inhabitants of our globe simply took, land and fruits and whatever else they wanted, and kept them if they liked or could do so.

It is a celebrated aphorism, again, of the great jurist Savigny that "all property is founded on occupation ripened by prescription." In other words, that property must originate in somebody (1) *taking possession* of something, (2) in *holding* that something against all comers, till (3) his *right* to it is perfected or matured by the feeling that the lawgiver ought not to allow the possession to be disturbed.

§ 13.

But neither this nor Blackstone's statement that a "title is acquired by occupancy" really tell us anything about the origin of the institution; for it still remains to be asked—'Why or how does the fact of your taking and long holding a piece of land give you a title to it'?

All that such aphorisms can be taken to mean, is (as Sir H. Maine explains) that, however far you go back into the history of law, you can get no further than the fact that there was once a taking possession or occupation of the thing, which, being wanted, was kept exclusively by the possessor[2], and that then a sentiment

[1] Occupancy, in this sense, means the advisedly (or intentionally) taking possession of something which at the moment belongs to no one, with the view of acquiring ownership in it for yourself—(Maine's Ancient Law, Cap. VIII, p. 245). This is a special use of the term different from the popular or ordinary one, as when we speak of an "occupancy tenant" meaning merely a tenant with a right permanently to occupy his land.

[2] I can here only briefly remind the reader, that possession by tribes or clans, where the individual is more or less merged in the body is, according to the evidence of ancient history, the first form in which property is held. In ancient times, tribes were often pastoral and generally moved from place to place; they then kept

gradually grew up, and ultimately became enforced by the community as a rule, that such possession ought not to be disturbed. *We* are now so accustomed to find everything of value with an owner, that we take it, as a matter of course, that everything *ought* to have an owner; and if no one has any particular claim, then the occupant is owner, because no one else can show a better claim.

All that we can really know about the "origin of property" is that our modern ideas, which are now embodied in our laws and language, and which include—

(1) the feeling that long possession ought not to be disturbed,
(2) the feeling that everything ought to have an owner,
(3) and that ownership resides freely in each individual,

are the slow growth of ages, and have, as a matter of fact, been so evolved in the history of the human race.

How it was that people thus came to feel that *long possession ought to be respected*,—which is the first important step, and how it came to be felt that every person ought to have a separate right to his own property, are questions connected with the growth of the human mind, and the sense of right and wrong which lies deep in the mystery of the constitution of man's mental nature and social instincts.

possession for a time only. Gradually the tribes took to agriculture and built villages. Then, to avoid quarrels, the land was naturally allotted or parcelled out between the sections and ultimately the families, of the tribe. It was then the section or the family (represented by its head "the pater-familias") that was at first looked upon as the collective owner. The idea of *individual* possession, now so strong, "every man may do as he pleases with his own, &c.") is the slow growth of ages. At first it was not contemplated that the property of a family should ever be transferred at all. Such an idea was received with difficulty; the process adopted was cumbrous and often involved the fiction that the *property did not go out of* the family, but that the *buyer came into* the family! Of course, as soon as civilisation began to make the smallest progress, transfer would become a necessity. Movable property, and goods and wares of all kinds, would be the first to be exchanged and sold, and to have a formal and tedious process of solemn conveyance in such matters, would have been intolerable. Hence the restriction as to transfer gradually broke down in this direction, and that prepared the way for greater facility in the transfer of immovable property; till at last we slowly emerge into the modern idea of individual ownership and the right of unrestricted transfer.

§ 14.

The time spent on this very elementary sketch will hardly be grudged by the student, since the subject itself is not without interest[3], and it has introduced us to some topics which must necessarily be understood if we are to have an intelligent grasp of the subject of property.

SECTION II.—OF POSSESSION.

§ 1.

The reader will observe that we have already several times used the word "possession" as a term intimately connected with property and ownership. But possession, as understood in law, is something different from what is meant by the term as used in popular language.

In the first place, possession does not mean mere corporal seizure or contact. If a man carrying a bundle containing his clothes, sits down in a field by the way side and deposits the bundle near him, he is certainly in possession of the bundle, though it does not happen to be in his hands, and he is certainly not in possession of the field, although he is in actual corporal contact with it.

§ 2.

The physical element in possession is therefore not mere holding or contact, but *the possibility of dealing with a thing as we like and of excluding others*[4].

Supposing a person wishes to put me in possession of a field which he has sold me; the price is paid and the contract of sale signed: it is not necessary that I should walk over every part of the land. I simply enter upon it, the seller assents, and I am in

[3] Those who have leisure to see for themselves what hidden interest lies in these questions of early law, will find in Maine's "Ancient Law," in his later work, "Village Communities," and in M. de Lavaleye's "Primitive Property," a wealth of information.

[4] Markby, § 321.

possession. But supposing that on going to take possession I find some one already on the spot who disputes my right. I, the buyer, cannot then be said to have possession till the opposition is overcome by consent or by force.

Just so with movable property. I buy a coat. I need not put it on to be in possession. I am equally in possession of it if it is put in my wardrobe.

§ 3.

Nor is it necessary that possession should be continuously exercised at every moment of time; but a man *continues in possession as long as he can at any moment reproduce the physical power of dealing with the property as he pleases.* A man who goes away from his house to a place of business, is still in possession of his house, because he can at any time return to it and enter it.

§ 4.

But possession recognised as such by the law, also requires—besides the physical power of dealing with the property, *the intention of the person to exercise the control on behalf of himself;* and this is ascertainable from the circumstances[5] of the case with which we happen to be dealing.

§ 5.

A person may also be in possession of a thing through his representative; and the correct doctrine is that this is not a fictitious but a real legal possession[6]. "All that is necessary to possession

[5] That possession (in a legal sense) consists not only in the physical control, but also in the determination to exercise it on one's own behalf, is also apparent if we consider how possession is transferred. Mr. Markby gives the following example (§ 336, p. 178):

Suppose that you and I are living in the same house; that you are the owner, and that I am a lodger. And suppose that you, being in want of money, sell the house to me; that you receive the money and formally acknowledge me as the owner, agreeing to pay me a weekly sum for permission to you to continue to reside in the house. No external change whatever need have been taken place in our relative position; we may continue to live on precisely as before, yet there can be no doubt that I am now in possession of the house and that you are not.

[6] Markby, §§ 339—340.

being the power to resume physical control, and the determination to exercise that control on my own behalf, I possess the money in the pocket of my servant, or the farm in the hands of my bailiff, just as much as the ring on my finger, or the furniture of the house in which I live."

This assumes the representative to be in friendly relation; that is, that he is not acting against me: the moment he does so and means to assume control *on his own behalf*, properly speaking, my possession is gone: or it is only by special devices and provisions of law[7] that my possession is held not to be lost.

In order, therefore, to have a valid "possession by representative," the representative must be in control by consent of the principal, and that with the intent to exercise his control on behalf of the principal[8].

Some consequences which follow from this doctrine, such as the possession by a court of wards, or a guardian on behalf of a minor or lunatic, need not be entered upon.

§ 6.

It may be well, however, to say a few words about the relation of landlord and tenant, which is intimately connected with this matter. We have all heard in India of "tenants with occupancy rights" and "tenants at-will."

[7] In English law, if you have received land from me on the understanding that you are to hold it on my behalf, there is hardly anything you can do that is *held legally to oust my possession*.

[8] In discussing the Burma landholdings in the Land Revenue Manual I referred to the definition of "possession" given in Act II of 1876, section 2. There possession was equally maintained if it was by a man's servant, agent, tenant, or mortgagee holding under him. Nor was the possession broken if the land was left to lie fallow in the course of husbandry, but had previously been held in the way described. So possession was maintained by the significant act of *paying the Government revenue* due on it, either personally or by agent, &c. This latter point is applicable everywhere in India. If ever it is shown that a certain person provided the funds for paying the revenue, even if he did not himself make the payment, it would go far to show that he was in possession, and the person ostensibly in occupation had in law a merely *representative* possession.

Under English law, and under most continental law, a tenant has always been held to have *only representative possession,* and that in spite of many express rights and remedies which would (if not guarded by the general doctrine) imply that he had a legal possession on his own account. On this view, the tenant is treated in fact, as a sort of bailiff for the owner, paying him a fixed sum out of the profits of farming, and retaining the remainder as his remuneration[9].

This mention of the English law is not superfluous, as it cannot be denied that from time to time it has largely affected the ideas which officials in India have entertained regarding the relation of the "zamíndár" to his tenant. The ancient law will not afford us any help, for the eastern mind did not, either in its customs or its legal systems, look at things in this way at all. The present relation of landlord and tenant has grown up to a great extent under the operation of our western law. We recognised a proprietary right in land, and in some cases the proprietor was a person who had, in the course of events, overridden the rights of the original landholders, and these latter then came into the position which, for want of a better name, we call that of tenant.

The position of such a 'tenant' then became somewhat perplexing to the Indian lawyer. We solved the question (speaking roughly) by various "tenant laws," which secured a permanent right of occupancy to such of these tenants as had either an originally higher position, or who had, at least by custom and general sentiment, some special claim to consideration. Thus, our solution of the question was necessarily not one based on any philosophically consistent theory, but on a desire to make some arrangement which would secure a practically valuable and lasting interest in the land to each of the different classes concerned.

Consequently, in India, we must probably conclude that "tenants-at-will," those who have nothing particular in their favour, and are only on the land by lease or contract, have a representative

[9] Markby, § 356.

possession; and with regard to those who have rights of occupancy, and cannot be ejected, may still be in representative possession to some extent; because they *pay rent* to some one: and that person's possession continues in the act of receiving his rent, to say nothing of his paying the Government revenue.

Mr. Markby[10] observes that, on the whole, while our law shows, on the one hand, a decided inclination to treat the tenant as having only a representative possession on behalf of the owner, on the other hand, his "right of occupancy" is clearly a right which is available against all the world, and not merely as by way of contract between him and the owner, in which case his possession is that of a "servitude" or right of continued user, not merely a mere contract-right. His possession then is, as I said, to some extent representative, and to some extent not: we cannot help the conflict of the two positions which arises out of the circumstances.

§ 7.

Returning to the general subject of possession, it may next be remarked that as actual physical prehension is not a necessary element in possession as understood in law, it may be possible to be "in possession" of things not actually tangible.

It is not, however, to all "incorporeal" rights that the idea of possession can be extended. We must not press the extension beyond what is fair; we can, however, speak reasonably enough of a person as in possession of a 'right of way' or of a 'watercourse'; and *hence possession extends generally to those rights which are called 'servitudes' such as the "forest rights,"* of which we shall have much to learn hereafter[1].

§ 8.

There is a peculiarity connected with possession in such cases which must be noticed. A person who has a right to cut firewood

[10] Markby, § 357.

[1] I need hardly quote authorities for the position that a *right* can be in *possession*. It is admitted as well in the French and German as well as English text-books.

cannot be engaged in cutting it every moment of his life. A man is not perpetually going to and fro over the land which is subject to his right of way. For months together in a dry season, no water may flow off my land on to my neighbours'. Such rights are spoken of by lawyers, owing to this circumstance, as "discontinuous" rights. Although it is easy to feel that such a right is still in possession, though it may not have been actually exercised for several days, or weeks or even months, at the same time we feel that, if, say, for several years, the right-holder had not once crossed my field, or during more than one winter (when firewood was most needed) had not once taken a stick from my forest, there might be very considerable doubt about his having maintained actual possession of the right. It is always a question of fact, whether, in spite of such an *intermission*, the right has been maintained[2]. But such intermissions are always dangerous, for, if the right has been intermitted for two years *next before* bringing a suit to establish the right, the right would be lost[3]. An *intermission* is not the same thing as an *interruption*. Under the Limitation Act an interruption is the act of some person against the right; it is, in fact, an indication that the right is disputed; and if the interruption is suffered or acquiesced in for a whole year, the right is lost[4]. The period after which an uninterrupted use gives a right, is twenty years under section 26 of the Indian Limitation Act.

§ 9.

There also remains one other point which I should notice, because *joint-ownership* is so very common in India. I allude to the nature of *possession in the case of co-proprietors*. The maxim of

[2] The English law has a distinction between rights of common and easement in this respect which has not been maintained in the Indian Act. In England an intermission at any rate of a right of common is no bar to a proof of a general user and possession for the required period (Williams p. 178.)

[3] Act XV of 1877, sec. 26: see illustration *b*.

[4] The Act explains that an 'interruption' occurs where the soil-owner or some third person obstructs the exercise of the right, and the obstruction is submitted to (being known) for a whole year.

English lawyers is that if there be two equal co-owners "each is possessed of the whole and the half." Each owner of the undivided property has access to and control over, every part of the property; and he exercises that control not only on behalf of himself alone, but partly in respect of his own share, and partly as representative of the co-owner.

It is well known that amongst Hindús, ancestral property is owned by the whole family. To take Mr. Markby's example. A Hindu dies leaving three sons; these three are the co-owners of the estate. The most correct view seems to be that the family is not considered as a corporation (a term I shall presently explain), but that no member of the family can assert that any part of the family property belongs *exclusively* to himself; but while he has a certain control over the whole, he is also in legal "possession" (as above explained) of his own right or share[5].

The village community of which we have heard so much in the Manual of Land Revenue Law and Land Tenures, is at once an organised patriarchal society, and an assemblage of such co-owners.

§ 10.

It only remains to be added that co-ownership must not be confounded with the ownership of "juristical persons," that is, of a body of persons *whom the law regards as one person.* Where property belongs to a body, to a registered "company" or a "corporation," the law regards the whole as *one* legal owner, and artificial provision is made for the exercise of the rights of the body by a representative; and a "common seal" is usually provided in order to attest the acts of the body. The legal possession of property is then in the one *juristical person,* not in the individual members, as it is in co-ownership.

§ 11.

Then, as to being put out of possession; *every act by which physical control is completely destroyed, puts a man out of possession:*

See Markby, paras. 311—312.

not so where the loss of control is incomplete. I leave my axe hidden in a wood, knowing where it is and intending to return and work with it next day; it is not out of my possession. I drop my ring into the river; it is completely out of my possession.

SECTION III.—THE CONSEQUENCES OF POSSESSION.

§ 1.

If we pause for a moment to take a retrospect of the ground we have traversed, we shall find ourselves masters of the leading positions, that, while in early society, definite notions of individual property were not entertained, a sentiment gradually grew up that people who were in possession should not be disturbed. In the course of time, and in the process of growth of legal ideas, it naturally came to be further asked—"What is possession?" and next such questions arose as—Who had the possession in land, the owner or the tenant? Who had it in case there were several co-owners? Could a man be in possession of a 'right' which was not a tangible thing? and so forth. As answers were found to these, the word 'possession' grew to be a term of law, and to have a meaning not exactly conterminous with that which popular language assigns to it.

We have also discussed the notions which thus came to be involved in 'legal possession;' *the power of dealing with a thing as we please to the exclusion of others, and the intention to do so on one's own account.*

§ 2.

We may next proceed to consider *the consequences which are attached to legal possession.*

One of these has already appeared to us. The law will always respect possession and maintain it, till a better right appears. You may have no kind of title, but if you have possession, you are maintained in it till, by proper steps at law, some one else has vindicated his superior right and obtained an order to dispossess you.

We shall frequently notice that in questions of land law, the settlement of boundaries, and so forth, possession is always looked to, and maintained; the party out of possession being the one whose duty it naturally is to go to law and prove his right if he can.

The XIIth Chapter of the Criminal Procedure Code[6] is devoted to the subject of disputed possession; for the strong feelings which usually manifest themselves in disputes about land and houses, often result in violence; it is therefore desirable to provide a procedure by which steps can be summarily taken to prevent disturbance.

And the plan is this: without entering on any question of right, the Magistrate proceeds to ascertain *the fact of possession*, and makes a formal order that the possession he finds to exist, shall not be disturbed till it is so in due course of law. If this possession is not ascertainable, or if neither claimant is really in possession, he may "attach" the property until a competent court has settled the right to it[7]. The claim to a right of way or other right of that kind, is decided on the principle before alluded to, that such a right may be virtually "in possession;" and if the Magistrate finds that the way or water-course, or whatever it is, is, as a fact, "open to the use" of the public or any person, or class of persons (*i.e.*, they are in possession of the user), he maintains them in the use, by making an order that no person can stop them, till the question is lawfully decided[8].

§ 3.

Lastly, another subject has been already foreshadowed in speaking of '*adverse*' possession of the land. If your possession has been open, peaceable (not maintained by fraud, concealment or violence),

[6] Sections 145—148.

[7] In cases in which dispossession has been effected by use of criminal force and the dispossessed person obtains a conviction on a complaint of the use of force, the Magistrate can at the same time order the sufferer to be restored to his possession.

[8] As a right of this kind is not exercised *at every moment of time*, it is necessary to fix an artificial limit, and say that it will not be held to be in possession unless it has been exercised within three months from the date of the enquiry, or at the last season (before the complaint) at which the right was capable of being exercised, if such is the nature of the right. This short term is fixed only for the purposes of the summary remedy we are considering.

and with the obvious meaning that the property is yours against all comers, that is called 'adverse' possession[9]. And if this adverse possession *has gone on for a long time* undisturbed, then the law steps in and, on grounds of public convenience, declares that it shall now be permanent, and nobody shall be allowed to disturb it in future. That is practically what is meant by a person getting a *prescriptive* title, or *title by prescription*. It is possible that in theory, some one may have a better title than you; still, if in practice he has neglected to establish such title for a very long time, the law will no longer listen to him, but confirms you absolutely in your seat.

And I may pause to remark that here we may see how our brief enquiry into the origin of property, has led us to a subject of practical importance.

For, although it is now rarely, if ever, possible to find unowned lands or valuable things and seize on them and so acquire ownership by "occupation ripened by prescription," still there are a great many cases in which a distinct transfer cannot be traced, or if it can the transfer appealed to (perhaps 150 years ago) may have been informal or altogether invalid: yet there is some one in possession who claims to be owner. Then the question of that possession being adverse and of long duration, becomes very important.

§ 4.

The way in which it operated, is well illustrated by the early Roman law, which acknowledged what is called a "usucapion."

Supposing that a person had held a piece of property, and his possession originated in a just title, but still there had been some

[9] In an English law case, *Tickle* v. *Brown*, Lord Denman said,—"Enjoyment, as of right, must mean enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked for from time to time on each occasion, or even on many occasions for using it, but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use it, without danger of being treated as a trespasser, * * * * (4 Adolph. and Ellis Reports, p. 382.) The Roman law maxim neatly expresses the principle and should be remembered. The possession must be, '*nec vi, nec clam nec precario*:' not by force, nor secretly, nor precariously.

flavour of informality in the acquisition, the Roman law said that he had "usucapio" of the property, and therefore condoned, as it were, the informality and confirmed his title, after two years in the case of immovable, and one year in the case of movable, property. It is this "usucapion" which has descended to the later Roman, and to our modern, law, under the name of "Prescription."

§ 5.

But, strange to say, the descent or admission of this ancient and very necessary principle, to modern law, was by no means an easy one. Owing to influences which we cannot here trace, the law was slow to recognise prescription *as giving a title.* And many lawyers insisted on a distinction between a period which *gave a title* by prescription, and a period of limitation which merely barred your right to sue in court. The doctrine was strongly maintained by some, that a right could never perish. Supposing then that you were out of possession for twenty years, your *right of property* could not perish by that lapse of time, although the law, by its rules of limitation, might prevent you from asserting your right against the actual possessor[10].

§ 6.

We need not, however, be further troubled with this refined distinction. Our Indian law has cut the Gordian knot and recognises the lapse of time as *giving a title,* and it declares the *extinction of the right* not enforced within the prescribed period[1]. What the period is, depends on what kind of property you are seeking the title of. A forest right, for example, or a right of way, of which possession has been properly and uninterruptedly maintained, becomes a prescriptive right in twenty years. If you had

[10] In Roman law the recognition of a *title* by prescription was made in the time of Justinian (Institutes Lib. II, Tit 6). In England no law of limitation existed till the days of James I, and I believe it is still doubtful what the effect of the Statute is—whether to extinguish the right or only bar the remedy.

[1] See Limitation Act XV of 1877, section 28.

held adverse possession of a field for twelve years, your title has become indefeasible. If you hold a watch deposited with you, and the owner does not reclaim it in thirty years, he can no longer do so[2].

Long possession covers all defects, except those which naturally one would perceive to be incurable[3]. Provided the possession was not by fraud, and was open and peaceable but yet showing the intention to hold *as one's own* (*i.e.*, "adverse") it will prevail[4].

SECTION IV.—ON THE TRANSFER OF PROPERTY.

§ 1.

I have now to offer a few remarks regarding the transfer of property. But it will not be necessary for us to enter on the study of any branches of law specially relating to transfer.

The whole subject of 'voluntary transfers,' such as sale, mortgage, lease, inheritance and succession, we shall have nothing to do with; nor shall we (except incidentally when we come to Civil Procedure) deal with "involuntary transfers" by process of court. But there are certain general features of the subject of transfer of which notice must be taken.

§ 2.

I have adverted to the fact[5] that originally ownership did not reside in individuals, but in sections of tribes and afterwards in

[2] *Ibid*, section 26 and the schedule, first division, Nos. 144, 145, &c., &c.

See Markby, § 383, &c. Here I may note the absurdity of the legal maxim that "prescription always presumes a grant," which is commonly given in law books as if it were really a fact. It possibly arose from the excessive dislike of lawyers to acknowledge a right which could not be traced to some recognised method of acquisition that was not open to question. The fiction that, even under circumstances where a grant was as unlikely as possible, nevertheless it was made, was invented accordingly.

[4] The period of limitation does not run as long as by fraud, or fraudulent concealment of a document; the person entitled is kept from the knowledge of his right, or is unable to establish it (Limitation Act, section 18). Nor, as long as possession is merely by permission of the owner, or is in secret and unknown to him; for the limitation runs from the date when the possession *becomes adverse*. (Schedule 1, No. 144).

[5] See note at page 9 *ante*.

families in common. Had every member of such a community held the specific right to dispose of his share in the property as he pleased, the family would have broken up.

Nevertheless, it was impossible to resist alienation under all circumstances whatever, but still, it was, in early historical times, made as rare and as difficult as possible. Every transfer was hedged about with solemn formalities and with devices for preserving at least the form of the family control.

To this day in Indian village communities this is kept up to some extent; there is always a "right of pre-emption" by which the intending seller must offer the property first to the other members of the community[6].

While this right has been maintained in India, we have otherwise passed into the more modern phase of feeling that property should be freely transferable.

§ 3.

This phase is always, of course, sooner reached in the case of movable property; but there remain in all cases certain features distinguishing the transfer of immovable property; and the cause of this it is not difficult to understand. A transfer of ownership cannot be regarded, observes Mr. Markby[7], as simply a contract. The essence of a contract is that it concerns the rights and obligations *only* of the parties thereto, whereas, it is the essence of a transfer of ownership that it concerns the obligations at any rate if not the rights (but frequently both) of an unlimited number of persons. And this is obviously much more the case with houses or lands than it is with movable property, though it is true of both.

[6] This is usually termed "haq-shuf'a"—an Arabic term derived from the Mussulman law, in which the right was acknowledged for purposes quite similar, *viz.*, to maintain the tribal or family union. This has been aided by provisions of the law, which render it difficult (and only as a last resort) to sell landed and especially ancestral property in executing a decree of civil court, or for satisfaction of arrears of Government revenue.

[7] Markby, § 470 (Supplement).

Supposing, for instance, that I am owner of a piece of land of which you are tenant, or of goods which are stored in your warehouse; if I sell this land or these goods to a third person without any communication with you, your position is naturally affected; you have to pay rent in one case or receive it in the other from a different person, and the right to resume the goods or the land at the close of the tenancy belongs to a different person: yet this change of rights and the obligations was not the result of any contract with you.

There is, indeed, no change in the *nature* or *extent* of the rights or obligations, and hence all you need is to *know the fact* of the transfer. All business transactions would be difficult, if not impossible, unless the ownership of property was known.

§ 4.

There is also another point to be noticed. The more permanent and valuable property is, the more necessary it is that the title of the possessor should be made secure and not liable to be made void. Supposing, for example, you find that you have unknowingly bought a horse which has been stolen, and that the owner reclaims it; after all, your loss and the inconvenience is very trifling; but it might most seriously affect a man, and perhaps the whole means of the support of himself and family, if he found that a purchase of a farm, or of a house in which he had settled down, was invalid and that he must suddenly turn out of it. Hence the law requires certain formalities and securities in the case of transfer of immovable property, tending to secure the *knowledge* of the *fact* of transfer, and to avoid the chances and inconveniences likely to result from fraud and uncertainty in the transfer.

§ 5.

In early law, indeed, there was no need to refer to these considerations, because the transfer of the right, and the transfer, in fact, of the property, were inseparable; but although, as time went on, the separability of the two things became gradually recognised, it

nevertheless long remained a rule founded on convenience that to complete a transfer there should be an actual delivery. An *intention* to transfer, or an *agreement* to transfer, might create a personal obligation between the intending transferer and transferee; but in order that the *ownership* should pass, delivery must follow.

Only traces of this principle remain in the law of modern nations. It would be too difficult and cumbrous a process to enforce in all cases; still the idea has remained; as may be judged first by the fact that some modern laws, while acknowledging the possibility of completed transfer without delivery, nevertheless place cases where delivery has occurred, in a more advantageous position than those where it has not occurred.

In our Indian law, it is perhaps not generally known, an oral contract of sale of houses or lands, *followed by actual delivery of possession*, is not put aside in favour of a written registered document of sale of a later date.

§ 6.

But when these traces of the rule requiring actual delivery of possession do not survive (or, in other cases, alongside of them), we have usually various rules of law which aim at *securing publicity to all transfers and preventing uncertainty by facilitating proof.* Some laws aim at the latter only, when they require particular agreements to be in writing.

In India the registration law aims at both objects. Thus, you may sell or mortgage land orally, if you give possession at the same time; but if possession does not follow, you will have no legally binding contract, unless it is in *writing and registered*[8].

The outlines of registration law, as far as practically useful, will be described in a later chapter.

[8] If the property is of the value of 100 rupees and upwards. I am also speaking of private transactions: In transfers to which Government is a party, the registration may not be necessary.

CHAPTER II.

OF SEPARATE RIGHTS OR SERVITUDES.

SECTION I.—THE NATURE OF RIGHTS.

§ 1.

We must now turn to a subject connected with ownership, which will be found, in the course of our study, to have a very great importance.

We have spoken of a man's "property" of "ownership" as if it was a simple and not a composite thing; but a reference to a few familiar examples will at once recall us to a sense of the incompleteness of such an idea.

I own a field, but at the same time the inhabitants of a neighbouring village have a right of driving cattle through it; this right prevents my ever cultivating (or otherwise utilising) the strip of land over which the cattle are driven. Government may be the owner of a forest, but, notwithstanding that fact, there may exist rights of grazing in favour of the neighbouring village. Here the Government officer in charge can never close the whole forest at once and plant it over; nor can he lease out the whole of the grazing, nor cut the grass.

In both of these cases the owner has something less than the absolute or perfectly full enjoyment of his property. In other words, while the property itself remains to the owner, and while his ownership is *not in itself* reduced or altered, still, some of the rights which go to make up a perfect or unrestricted ownership, have been as it were detached and vested in other persons. The detached rights are of the nature of "ownership" *in this sense only* "that they are rights over a specific thing available against the world at large[1]."

[1] Markby, § 393, page 198. I cannot express this with the accuracy that I should like. The subject will, however, become clear by the aid of what follows. It is of immense importance to understand it thoroughly. Misapprehension on the subject is at the bottom of many of the difficulties with which the attempt to introduce rational forest law into India has been beset.

§ 2.

Ownership (which the Roman lawyers described by the convenient term *dominium*, as meaning *full* or perfect ownership) may be regarded as an aggregate or bundle of all possible rights which, together, make up an absolutely unrestrained enjoyment.

The Roman lawyers neatly expressed this by saying that the *dominus* or full owner had the use (*usus*), the whole of the products, (*fructus*), the right entirely to consume (*abusus*), and the right of transferring or alienating at pleasure (*vindicatio*).

If a certain right to use some of the produce or to do something, or have something done, were, so to speak, broken off and separated from, the total of rights which made up full ownership, such a separate right was called by the Roman lawyers a "*servitude*," because the person who held the separated right over some one else's land or house, or forest (or whatever it was) made, as it were, the property *to serve* his purpose.

§ 3.

The student will not, I trust, feel staggered at this allusion to Roman law. But, in fact, the Roman law dealt so neatly, logically, and conveniently, with the subject, that both the method and language have been either adopted into, or at least have largely coloured, modern systems of law; and the language of the text-books in which those systems are explained, would hardly be intelligible to a student who did not know what the Roman terms meant.

§ 4.

In England there is no general term for these "servitudes," nor do we find a complete classification of such rights. The English law, indeed, gives a special name, "*easements*," to *one* class of these rights, leaving the others to be merely called 'profits à prendre' or 'rights of common.' This classification is one of mere convenience, and at the same time the line of distinction is by no means clear. For example, a right to take water from a neigh-

bour's spring is an easement in English law, but a right to take coal from his pit is not; it is a right of common[2].

§ 5.

In classifying servitudes, the Roman lawyers adopted a distinction based on the circumstance that the right affected the *soil* itself, or something built on the soil. One they fancifully called "rural," the other "urban" servitudes: originally, I suppose, because buildings were commoner in the city and the open soil in the country. Obviously, however, a right of way or right to use a spring, affecting the soil itself, might be in the city, and a right connected with a building might be in the country.

§ 6.

A more important distinction, however, is one which has been adopted into several modern systems of law. Servitudes were divided into "real" and "personal."

[2] This circumstance has probably led the framers of Indian Statutes to extend the meaning of the word easement. In the latest Limitation Act (XV of 1877) easement is now defined to *include* rights to produce, &c. And the "Easements Act V of 1882" has made use of the same extension of sense: but the Act only relates to rights which are real servitudes—held in respect of immovable property and is not yet generally applied to. As regards the English law distinction, (Mr. Markby, §§ 373—375) attributes it to practical convenience. Easements are all concerned "with the enjoyment of their respective properties, by contiguous owners on points of great importance on which they are likely to come into conflict; they are rights which relate to getting rid of what is noxious, to procure a plentiful supply of that which is useful, to free ingress and egress, and to the commodious exercise of trade." Contiguous houses require the regulation of the support, which one, or the soil on which it stands, gives to the other. They require that questions of drainage, rain drippings and water passing on to, or through, the other house, should be settled; they require also that there should be access to, and means of getting out of the house; that air and light should come in; that water should be available; and so forth. Contiguous lands are in the same position; a right of way from one to another; right for passage for drainage or canal water; right to support of the soil by the adjacent soil,—all these matters are evidently of one kind, and are governed by the same set of rules; therefore they came to be called "easements," without it being precisely defined what were the limits of the term. It is easy to conceive, but not very easy to put into language, a distinction between this group of rights, and rights to dig sand or gravel, to cut turf or grass, to graze cattle, and to cut firewood or timber. One feature at least they have in common, they may equally be acquired by prescription.

Real servitudes are those which only exist *in connection with some property*. A right of way from your field across B's close is a real servitude, because it is connected with *your field;* it is not you as an individual that have a right of way across B's land, but you *as owner*, for the time being, *of the field*. In other words, the right of way over B's land is attached to the field, no matter who owns it for the time being.

And when our Indian Acts speak of the right being "*appendant*" to some property, they mean that it is attached in this way. In such cases, the property which has the right is called the *dominant* estate, and the other over which the right exists, is the *servient* estate. Thus, a Burmese monastery, which has a right to bamboos from the neighbouring forest, is the *dominant* and the jungle the *servient* estate, and the right is "appendant" to the monastery[3]. Other rights which reside in a man, as a person (whether or not he is owner for the time being of a particular house or land) are "personal" servitudes, or, to use the English term, "in gross." I may have a right to graze twenty cows in your forest, not because I am owner of house A, but in my own person: then that is a personal servitude.

§ 7.

There are no doubt many rights which, in their very nature, must always be "real." For instance, if I have a right, as against you, not to have my light and air blocked out by your building, it is obvious that it is in virtue of *some house* or *property* of some sort, of mine, which is not to be darkened or confined, that the right exists; and if the house permanently ceased to exist, the right would cease also.

[3] I do not know why our Legislature chose the word "appendant," because, in the English law, the term a "right appendant" has a very peculiar and special meaning. In fact, it means that the right in question is, by the common law, invariably understood to be attached to a *particular kind of land tenure*, which the student need not trouble himself about. The ordinary term in English law for a right which is a *real* servitude (that is, in favour of one property over another) is "appurtenant" not "appendant." In the Burma Forest Act (XIX of 1881) the use of the term appendant has been avoided (and so Act V of 1882); the right is spoken of as being "for the beneficial enjoyment of" the dominant estate.

If I have a right to let my drainage water flow on to your land, the right must be because of a house or some land from which the drainage comes. Rights of way also furnish a good example: unless you have some house or land *to go* to (which is the dominant estate), it is impossible for you to have a right of way over my field[4].

But many other rights, such as a right of common, of grazing, of fishing, cutting turf, feeding pigs on acorns, or of cutting wood, may be either personal or real.

In India I do not think it possible to draw any line between "real" and "personal" servitudes on any other grounds than the nature of things.

In the case of forest rights, no doubt the rights are very generally not personal, *e.g.*, it is the householders of village X that have the right of grazing in forest A. If one of these inhabitants were to go away and reside permanently somewhere else, he would lose the right. But it is easy to conceive cases where the right might be personal. I mention this, because in the continental text-books, it is stated or taken for granted that forest-rights are always real servitudes. This could not be applied strictly to India.

The Act V of 1882 (at present only in force in Madras and the Central Provinces) will not, even if generally extended, affect any servitudes except *real* servitudes.

§ 8.

I will now conclude the subject of servitudes with a few necessary remarks on the way in which such rights are acquired.

I have already remarked that by a fair extension of the term, there may be such a thing *as a possession of a right*, although a right is an 'incorporeal,' not a tangible thing.

This possession is governed by exactly the same principles as before; it is not any mere physical act as such that constitutes the

[4] Nor need I account for a possible right residing in a person, to go, not to some property of his across another's field, but to a church or a market; for here the church or market, though not the property of the right-holder, are in obvious analogy.

possession of an easement or other right; for I may walk down your garden a dozen times on my way to transact business with you in your house, but no one would say I have any possession of a right of way through your garden. On the other hand, you inform me that a path across your field is at my service for ever, and remove a locked gate which hitherto blocked it up. I am in possession of the right of way thus granted, as effectually as if I walked over the land in order to assert my right. So, if without any permission or grant, but still for generations past, I have openly and peaceably and as of right, walked along a certain line, and can do so when I please, though for weeks together I may not need to go that way, still I am in possession. There must *be the physical possibility of enjoying the right, at any time, and the intention so to enjoy it as one's own right,* the owner of the servient property submitting to this. I have also explained[5] the difficulty that arises as regards the continuance of the quasi-possession of these rights when, in their nature, they are 'discontinuous.'

§ 9.

These servitudes or rights are acquired very much in the same way as property is. They may be acquired now by *transfer.* For example, my house A has a right of way to it through a certain courtyard. If I sell the house A, the right naturally goes with it.

Some rights cannot be transferred: this is usually the case with personal rights, and arises from their nature. For example, I have a right to take firewood from the neighbouring forest. Here the origin and nature of the right may indicate that it is a right for the personal convenience of the right-holder. I then cannot sell the right to some one else. Not only is the right itself inalienable, but the right-holder cannot sell the produce he obtains in the exercise of the right, because it is for his own use and convenience, and if he does not personally require it he ought not to collect it. But there may be cases where the right itself is to *cut for sale,* as

[5] Page 15, § 23, *ante.*

where hill tribes have a right to cut firewood or bamboos and carry them for sale to the neighbouring towns[6].

§ 10.

These rights sometimes originate in a *grant* by the proprietor of the estate. Generations ago, the lord of a forest may have granted to my ancestor and his descendants for ever, a right to take ten trees annually from his forest for building purposes.

§ 11.

But more frequently, especially in India, the origin of the right is not so traceable. It is then said to be a 'prescriptive' right, and this term has been explained. No one very much cared about the often vast tracts of waste and jungles in the old days, and so the neighbouring villagers got into the habit of openly and, as of their own right, and peaceably, grazing cattle, cutting bamboos, collecting dead leaves, and so forth, in the forest. This went on from year to year, and from generation to generation, till the practice is held under our law to have "ripened by prescription" into a *right*. The Limitation Act, as I before remarked, admits this in all cases where the right has been exercised "peaceably and openly" by any person claiming title thereto as an easement (*i.e.*, as a right not arising out of mere agreement or contract), and as of right, without interruption for twenty years[7]. Where such a practice had gone on in a forest which Government, say, had distinctly claimed as its own, at settlement or otherwise, and where the people knew they were acting on sufferance and by permission,

[6] Forest Rights are so very generally (in their origin and nature) rights for personal convenience, that the Forest Law in India contains an express provision that no forest rights can, as a rule, be alienated, unless, of course, they are appendant and follow the transfer of the dominant estate, or unless it expressly forms part of the right itself, that its enjoyment is alienable, or the produce of it saleable.

[7] Section II § 23. I have there explained what interruption means, and how far it is necessary that the right should have been used without intermission.

there would be no real right, but only a permissive enjoyment or license[8].

§ 12.

As I have described how separate rights of user or servitude may be acquired and possessed, so I must say a few words as to how they may come to an end.

When rights are extinguished by compensation, pursuant to a special provision of the law, they of course cease to exist. This part of the subject I shall consider further on, with special reference to forest rights.

There are, however, certain general matters connected with the extinction of rights which may be mentioned.

[8] Our Forest Law has not taken notice of anything but actual rights, which is the proper plan, because, in the case of what is technically a mere permission, one of two things would happen: either it would be a matter so clearly of favour that it might be simply stopped without hardship at any moment and would need no special consideration, or else it would be a practice so nearly resembling an actual right that Government would practically allow it to be such, and treat it accordingly.

I may here briefly remark that it was doubtful whether a right of this kind could, under the Roman law, be acquired by prescription, and in a case decided by the Bombay High Court in 1875 (Conservator of Forests *v.* Nagar das Saubhagya das) KEMBALL, J., said.—"It may be a question whether, assuming that there is satisfactory proof of user, the right to cut down and dispose of timber on Crown lands, in other words, to enjoy absolutely that which is incidental to the proprietorship of the soil, can be claimed by prescription."—(See *Attorney Genl.* v. *Mathias*, 27 L. J., Chanc. 761.) The meaning of the passage is this: that the right of cutting trees belongs, of course, to the owner of the soil; and, consequently, persons who go without leave and cut trees of their own accord, are, strictly speaking, trespassers, and are committing a theft; and the principle laid down in the law case alluded to by the learned Judge was that no length of time will give you a right to do an act which is in itself unlawful. The case, however, of taking timber and forest produce is rather peculiar, because, though the land belonged, as all unoccupied waste does, to the Crown, still no one, not even the Crown itself, looked upon the occasional or even constant taking of timber, grass, &c., as any wrong, but rather as an innocent practice, which it could at any moment stop, if it wanted to do so, but which the State did not in fact care to stop. In such a case it would be hard to say that the practice could not ripen by prescription into a right. The question, however, has been wholly set at rest since the passing of the Limitation Act of 1877, which clearly recognises the acquisition of any "easement" (including rights of user of forest produce) by prescription.

As to the distinction between a *right of user*, and a license exercised *on sufferance* and the objection to the term 'privilege' so often used to indicate the latter in India, the student will find some further remarks in the Chapter on Forest Rights, further on.

Some rights are only granted for life; they, of course, become extinct when the right-holder dies. So a right may be granted in consideration of some service; it expires when the service ceases to be rendered.

A right also may be voluntarily given up, as where a right-holder, without objection, permits a total alteration in the management of the servient estate, whereby the exercise of his right is necessarily rendered impossible[9].

If a forest or other estate which bears the right is washed away by river action, the right itself ceases also.

A right also that has not been in existence for the last twenty years, would have been lost by prescription.

If also a right that has been obstructed ("interrupted") and the obstruction has been acquiesced in, or submitted to, for one year after the right-holder had notice of the interruption, the right would be extinguished (unless, of course, a new period of twenty years' enjoyment ran after the interruption).

A right (as I before explained) which has been generally maintained during twenty years, may have been voluntarily intermitted in its exercise from time to time, without being lost; but if it has even been voluntarily intermitted for two years next before bringing a suit to establish it, the intermission will be fatal[10].

Forest rights also are extinguished if in the process of settling a reserved forest, they are neither claimed nor ascertained to exist[1].

[9] Roth, § 315.

Ibid, §315, No. 4. Whether it would revive again, on new land forming in the same place, I cannot here undertake to determine.

[10] Limitation Act, sec. 26 (Act XV of 1877), and see section § 23, *ante*. See also Act V of 1882 (the Easements Act), which includes all *real* servitudes, *i.e.*, rights that are for the beneficial enjoyment of some property. The Act is, however, not yet in force save in Madras and the Central Provinces and Coorg.

[1] Forest Act VII of 1878, section 9; Burma Act XIX of 1881, section 19.

I have only attempted to note, by way of illustration, a few of the cases in which the extinction of rights is likely to occur in the experience of a Forest Officer. In systematic treatises on the subject, this matter is more scientifically treated: thus, for example, Eding (page 125) enumerates the causes of extinction:—

(1) The disappearance of the dominant estate; *i.e.*, a village has a right of grazing; Government expropriates the whole land, and the inhabitants go away and the estate ceases to exist, the right ceases also.

SECTION II.—DISTINCTION BETWEEN RIGHTS (SERVITUDES) AND OWNERSHIP.

§ 1.

As it is clear then, that a servitude or right residing in one person over the property of another person, may exist without any way touching the ownership (though limiting its enjoyment), it follows that no right-holder has any share in the property, or is a *co-owner of the estate.* Nor will the exercise of mere rights of user or separate servitudes, however extensive, however long enjoyed, ever give rise to a claim to ownership in the estate.

This principle, which is indeed obvious, but still is of great importance to have clearly established, has been constantly overlooked by those who have seen difficulties in the way of forest legislation in some parts of India.

An attempt to appropriate a large area of forest on the west coast of India (North Kanara District), partly in contravention of this principle, has recently failed[2]. The plaintiff in that case pretended, indeed, that he had grants and 'sanads,' which turned out to be either forged or otherwise invalid; but apart from that, it was contended that because he (and his ancestors) had been in the habit of cutting down patches of forest for temporary cultivation here and there over the area claimed, and had also paid the assessment of revenue taken from "kumri"-cutters, that, *therefore,* he became entitled, not merely to a right to this practice as a servitude (which is another matter altogether), but to be considered owner of the soil, in fact of the forest estate itself. It was

(2) The disappearance of the servient estate (example above given of a forest washed away or completely burned down).

(3) The dominant and the servient estate became one. Government forfeits for crime a village which had a right of grazing in its forest. Here both estates become the property of Government; the right is extinguished.

(4) The right is compensated for.

(5) Is lost by consent, or by interruption submitted to.

(6) Is lost by prescription.

[2] The Kanara case (see list of abbreviations).

shown that, no doubt, persons holding land, did, as a matter of practice, go into the jungle near at hand and make temporary clearings; and that when it was known they did this, the Government charged each cutter (or the landholder who employed or allowed him) with a certain tax per knife used in clearing the ground; but the Judges (though giving different judgments on the case at large) both held that this did not indicate a permanent occupation of the soil itself. The Government officials put a tax on everything of the kind—pepper and other wild forest produce included. This was clearly not the same thing as Government admitting a permanent right in the soil and assessing land revenue on it and engaging with the holder to pay it, as being in proprietary possession[3].

§ 2.

It may also be inferred from the language of Indian Statutes that our legislature has never admitted the idea that a right-holder has anything in the nature of a share in the ownership. It is only necessary to look to the Limitation, the Land Acquisition, and other Acts, to see that a distinction is drawn between rights *in* land and rights *over* land—a distinction which would have no meaning of rights of way, of grazing, &c., constituted a share *in* the land ownership itself. The definition in the Limitation Act also expressly alludes to rights in virtue of which "*one person* is entitled to appropriate for his own profit, any part of the soil or anything growing on it, *belonging to another*."

[3] The mere fact of "having made temporary use, or intending to make use actually or potentially, of a particular area or parts of it, is not possession" giving rise to proprietary right (Kanara case, page 581). And again "should it be considered that the plaintiff had established a right * * * * to have kumri cultivation carried on in certain places, such a right would not involve general ownership in the soil" (pages 513 and 514). This is no doubt the correct doctrine; and I think the learned Mr. Joshua Williams must have a moment forgotten the distinction between acts which may give rise to a claim to a servitude or right of common, and those which amount to taking possession of the soil, when he wrote his remarks on the case *Tyrwhitt* v. *Wynne* (Williams, page 155). The learned author also quotes another case, which is directly against his own remarks, and supports the judgment in the Kanara case.

§ 3.

Besides this direct authority in India, the proposition is fully established by authority of the laws and text-writers in Europe.

It is well known that at the time of the first French revolution great interest was taken by the revolutionary party in the work of destroying all that savoured of feudalism, or of any special privileges of the aristocratic class. And an attempt was made in this interest, to assert that rights of user, which were exercised by the common people in the forests of the nobles or the State, constituted a co-ownership or share in the proprietary right in the forest itself. M. Proudhon, an eminent jurist of Dijon (otherwise of great authority), adopting the revolutionary views, supported this view, and it was actually embodied in a law of 1792, which gave the right-holder the power to demand a partition of the forest and to get a share of the estate in lieu of his right[4]. The Forest Code of 1827, however, repealed the law of 1792, and declared that the right-holder had only his right (servitude), and that if it was to be bought out by money or by "grant of land" (*cantonnement*) it was the proprietor of the forest only who could proceed to this[5].

[4] M. Proudhon's views are discussed in the Répertoire (Dalloz et Meaume, Art. "*Usage*," paragraph 237). The principle was actually adopted in the law of 28th August 1792 (Art. 5), (Meaume: Vol. I., §. 7) which gave the right-holder the right of demanding "cantonnement," that is, of claiming a part of the estate itself in lieu of his right; in other words, demanding a division of the estate as if he was a co-sharer in it. It seems clear, however, that M. Proudhon allowed himself to be carried away by zeal for the cause of popular emancipation; and his assertion that the rights of user were "même en quelque chose du droit de propriété foncière" is not consistent with his own opinions elsewhere expressed. For example, in dealing with the question whether a person can have such an extensive right as to deprive the forest proprietor of the *whole* of *the products*, this same author says (in a passage referred to by Meaume, Volume I, § 192, page 250)—"It would be contrary to the nature of things to give such an interpretation to a concession of *right of user*, because that would be, in some sort, to convert the grant into an act of alienation *of the estate itself*. It is more reasonable to hold that the founder of a *simple right of user* intended only to associate the grantee with himself in the *enjoyment* of *his forest*." (The italics are, of course, mine.)

[5] Code For. Art. 63.—In the discussion which took place in the Chamber of Deputies when this 63rd Article was proposed, M. Favard de Langlade (the reporter on the bill) said—"How can we acknowledge a co-proprietary character in the case

§ 4.

The authorities are quite unanimous now in accepting the principle under discussion[6]. M. Curasson speaks of the idea of co-ownership as an "aberration de tous les principes."

And also in another place [7] that unless "the title expresses, in formal terms, a grant of proprietary right, however extensive may be the rights of user,—even if they should go so far as to cover the entire surface products of the forest,—the title would *not be* proprietary."

"And so Meaume[8]: "A right of user * * * confers on him who possesses it, a simple right to participate in the enjoyment of the produce, but in no sense in the ownership of the estate."

§ 5.

The German authorities are exactly to the same effect. "To the right-holder," says Dr. Pfeil[9] "nothing is conceded but the enjoyment of a certain part of the produce of the forest, and to concede him something quite different from this—a proprietary right, or estate in the soil—is so contrary to every principle of law, that no one who has any grasp of the subject of private rights, could admit it for a moment." And Roth[10] speaks of "rights over *another* property which limit or restrict full ownership."

of the rights of an owner and those of a right-holder which are here opposed to one another? So far from the idea of a right of usage in the forest (which is only a kind of limited usufruct) carrying with it any idea of ownership in the soil, it excludes rather any such notion; for one cannot have a right of user *except over the soil* belonging *to some one else.*" * * * * "The innovation of 1792 may have been dictated by the circumstances of the time, but it is inadmissible in the present state of things."

I may add that this Article 63 was passed *without a division*—(see M. Brousse's edition of the Code *ad hoc*).

[6] Vol. II, page 356.

[7] Vol. II, p. 264.

[8] Meaume, Vol. I, § 129.

[9] Pfeil, page 66. (See abbreviation list at the beginning for full titles of works quoted.)

[10] Roth, § 251, and see Eding (page 74) to the same effect.

So Professor Bluhme[1]. "They (servitudes) can be separately eliminated from the totality of the rights of ownership, and be transferred to one who is *not the owner* (*auf einem nichteigener.*)

And so under the Hanoverian law: "rights of ownership in the estate itself are essentially distinct from mere rights of user, and have, in many respects, effects or consequences entirely different[2]. Exactly the same is the principle laid down by the law in Saxony[3].

§ 6.

The English law authorities are, in all respects, conformable. Thus Cooke says[4]:—"A right of common has been defined to be a right which one or more persons may have to take or use some portion of that which *another person's* soil naturally produces." And, again, speaking of a peculiar right called "cattle gate," which *is* a sort of joint interest in the soil, he says:—The owner of a cattle gate holds it as having a joint interest in the soil *which* a *person having* a *right* of *common has not*[5]." And so Mr. Joshua Williams[6]. "The soil of the waste lands of a manor * * * is always vested in the Lord of the manor, notwithstanding the rights which the commoners may have upon it. The lord, therefore, as owner of the soil, has the same rights as other owners, except so far as the existence of the rights of the commoners may prevent him from exercising those rights."

§ 7.

I think, then, that the matter is beyond dispute; and I trust that the student has fully mastered the distinction itself: that he appreciates the difference between a person who has a share in the ownership, *i.e.*, in *all* the rights which go to make up the owner-

[1] System des Privat recht, § 201.

[2] Hannoverische Landes Œkonomie Gesetzgebung. (*Provinzielle gesetzgebung* § 51, page 12. (Hannover 1864.)

[3] Qvenzel, p. 180 (Reallasten.)

[4] Cooke, page 5.

[5] *Ibid*, pages 43—44.

[6] Williams, p. 150.

ship, and one who has only the enjoyment of some one or more separate fractions of the full enjoyment.

If you wish to establish ownership, you must show facts of exclusive possession which are *inconsistent with any one else being owner besides you;* that you, in fact, have had the exclusive disposition of the *property itself*, not merely of some, or even all, of its products.

§ 8.

This distinction which, owing to its importance, I have enforced in detail, has a very practical consequence, namely, that a right of user not being a proprietary right, it *can only be exercised or exist to an extent which is compatible with the safe existence of the estate itself.* For the right to destroy a thing (*abusus*) is a part of the proprietary right, and it is a contradiction in terms to suppose that a person who has not the ownership should have a right to destroy the thing owned. Moreover, such an exercise would go against the lasting enjoyment of the right itself. This subject, however, will be more conveniently dealt with in a later section.

SECTION III.—RECAPITULATION.

§ 1.

We have thus far examined in outline the chief questions which arise out of the subject of ownership and property.

We have briefly alluded to the classification of property and the modes in which such classes of property may be acquired.

We have also considered how it is that men come to be regarded as owners of things ("chattels") and lands, that is, to have a "title" to their estates; and we have seen the insufficiency of the ordinarily received theoretical origin of property, and we have ascertained that modern ideas of property are late developments, and that originally, individual rights were not recognised; whatever rude ideas of property existed, they had no reference to a belief

that everything ought to have an owner, or to any defined idea of a title or right being a consequence of possession.

In the course of time the sentiment that possession should be respected, gathered force, till at last it came to be the rule that 'possession' under certain circumstances, after a certain time, should not be disturbed.

We examined the legal ideas of possession and the effect of such ideas on tenant right and co-ownership, after which we traced the process by which possession ripens into a title.

We next passed to the consideration of transfer of ownership, which is practically the form in which, in the existing state of things, property is acquired by new owners.

After briefly noticing the restrictions which in early times existed on the transfer of property, and especially of immovable property, we found a portion of such restraints still enforced in the form of a right of pre-emption as necessary to prevent the disintegration of communities.

We found next that there was difference between a contract of transfer of property and a mere agreement to do or not do something, because a transfer might affect more persons than the two parties to the contract; and we found that the law early recognised the necessity of transfers being public and also certain.

We noticed the early legal provision which insisted on *delivery* as necessary to a complete transfer, and how modern law has not kept to this, but has replaced it by conditions tending to secure publicity, and to prevent uncertainty and consequent litigation, and we noticed the course of law in this respect, in India, the Registration Act having resulted from an application of the principles in question.

We then considered the case of servitudes or separate rights—rights which were broken off, so to speak, from the ownership of an estate and attached to persons other than the owner. We learned that the right-holder is owner of the right, but not in any sense a co-owner or sharer in the estate or property itself. We considered

some classifications of these rights, how some of them were always found in connection with some property which was the '*dominant*' estate (that *over* which the right existed being called the *servient* estate), and others might belong to a *person* without reference to his being owner of any property. We learned that rights could be "possessed," and that they were acquired by prescription (originally), or by transfer, much the same as proprietary rights were.

Finally, we reserved the consideration of some special consequences which flowed from the nature and origin of servitudes, till we should come to speak specially of forest rights as dealt with by Forest Law.

CHAPTER III.

OF GOVERNMENT PROPERTY AND ITS ACQUISITION.

§ 1.—*The Government as successor to the East India Company.*

Just as property may be acquired, held and transferred by individuals, so it may by the public; that is to say, the Government representing the public rights and public welfare, may be the owner of property; and this property may be left to it by will, may be acquired by purchase, and may originate in conquest or simple taking possession and maintaining it for a long course of years, just in the same way as private or individual property.

In India the Government derives the means of paying its servants and supporting its armies, its police and other branches of service from its land revenue and other taxes. But besides this, it possesses, *as proprietor,* various estates and properties which it has acquired, and still acquires, in various ways.

When the "Act for the better Government of India" was passed in 1858[1], there was a great deal of property which was held by the East India Company as a corporate body, and such property was, like the property of any one else, liable to execution and to other processes of the Courts of Law. In the same way the Company could sell or mortgage such property and enter into contracts with any private person.

On the passing of the Act above named, all such property became vested in the Queen for the purposes of the Government of India[2].

In India, therefore, the Secretary of State in Council, as succeeding to the East India Company, can sue and be sued just as the

[1] 21 & 22 Vic., Cap. 106.
[2] *Ibid,* section 39.

Company could[3]; and property in land, money, goods, stores, and other "real and personal estate," which belonged to the Company and became vested in the Queen under the Act, or has been acquired for the purposes of Government, is liable "to the same judgments and executions as it would, while vested in the Company, have been liable in respect of debts and liabilities lawfully contracted and incurred by the said Company." This of course applies to property which Government holds as any private person or corporate body might hold, and does not refer to property which is held in its Sovereign capacity or as the Public Trustee (if I may use the phrase), as, for instance, the proceeds of revenue and taxes in the treasury, the ground occupied by the Grand Trunk Road, a military fort or barrack, a public office, or a Government hospital[4].

§ 2.—*Right by conquest.*

As some of what is "Government property" at the present time, has come to be so from the rights of former rulers, I may here conveniently introduce a brief notice of the principle on which property passes in the case of provinces that have come under British rule by conquest.

The modern law of nations does not recognise the earlier idea that on conquest, the captors become possessed of *all* property in the conquered State. *Private* property is not considered as interfered with, still less as being annihilated or transferred. When a province passes under British rule, the political system—the form of

[3] *Ibid*, section 65. In this respect India is different from England. The Crown cannot be sued in England; but there is a procedure which is practically a suit though called a "petition of right," being heard in Court with argument by Counsel, &c.

[4] And among such property, held as a sort of public trust, would, I think, be included a forest managed by Government under the Forest Law. The placing of forests under the Act is made to depend on the forest being the property of Government, or the Government having rights in it. In some cases this property may have come down to it as a *special property*, in a way that will presently appear. But more commonly Government has a property in the forest by virtue of a Sovereign right in waste uncultivated land, which will be described further on. All *such* forests, at any rate, would be property held in a Sovereign capacity.

administration—that of course is superseded; but the laws which regulate the private relations of individuals to each other are not abrogated. This rule is, however, only the result of equitable considerations which would induce a civilised State in the position of conqueror to respect such laws, and does not depend on any inherent validity in the laws themselves[5].

Following the same principle, whatever property belonged to the Government of the conquered State, becomes also the property of the conquering[6].

Having disposed of these general considerations, I shall proceed to offer some remarks which may be useful on Government property under the several heads under which it is most usually found. These are—

(1) Estates which are acquired or held by succession to the rights of former Governments.
(2) Lands occupied by roads, canals, river-beds, railways, &c.
(3) Waste lands.
(4) Lands acquired for public purposes, under which head I shall briefly describe the legal procedure by which they are acquired.

SECTION I.—PROPERTY HELD IN VIRTUE OF ANCIENT STATE RIGHTS.

§ 1.—*Escheat.*

This head needs only a very brief notice. The Government becomes entitled to property to which there is no claimant owing to a failure of heirs. This was one of the ancient State rights in the

[5] See Broom's Constitutional Law (edition of 1866), page 21, and the case of *Campbell* vs. *Hall* (State Trials, XX, page 322). The new Government has *power* to alter any such law or custom; and, as a matter of fact in India, has sometimes done so, when the law or custom abrogated was opposed to sound policy or to natural justice; as, for example, when our Government abolished the practice of "satti" or burning of widows on the funeral pile of the husband, or when it has refused to recognise the law that a person changing his religion loses his rights to property or to inheritance as a consequence (Act XXI of 1850).

[6] Dana's Wheaton's International Law (8th edition), note to pages 334—335.

Hindu Ráj. Such property is now commonly called "nazúl[7]." In practice, the term "nazúl" is even more widely applied. Building sites, for example, in civil stations or encamping grounds, are often spoken of as "nazúl," when, in reality, they are Government property, not by any lapse or escheat, but because they are parts of a plot of waste or uncultivated land set aside by Government for the site of a station, or set aside for the encampment of troops on the march.

This extension of the term is due merely to the fact that the income of certain properties is credited to a particular fund, such as the "nazúl fund" of former days, and now to the funds made over to Municipalities. Nazúl property is then any Government property, the income of which goes to a particular fund and not to the general revenues.

§ 2.—*Forfeiture.*

Again, Government may become entitled to property forfeited for crime. Forfeiture is awardable by law in some cases; and in such cases in India, not only property in possession of the convicted person is forfeited, but during the whole term of his punishment

[7] See Regulation XIX of 1810 (preamble), which, however, assumes that escheats belong to Government and does not say so; only providing that nazúl property shall be considered in a certain way. This Regulation applies to the Lower Provinces (Bengal) and to the North-West Provinces. It is not in force in the Panjáb, Oudh, or Central Provinces; nevertheless, houses, gardens, and lands do occasionally lapse to Government by escheat in these provinces, so that the matter must be regarded as one of general law or principle which has been specially recognised as existing by the Regulations in Bengal. See also 16 and 17 Vic., Cap. 95, section 27; Act X of 1865, section 28, and several law cases, e.g. *The Collector of Masulipatam* versus *Cavally* 8 Moore's Ind. App., page 500; Bengal Law Reports, P. C., 87, &c. The case first alluded to puts the right on the general ground, that if there is no private owner for an estate, the State must take it for the public benefit. The right of the King to property left without heirs, or to ownerless property for which a proclamation has been for three years issued without effect, is mentioned in the Institutes of Manu (Chap. VIII, 30). See Elphinstone's History, (5th edition, 1866, page 23). The Hindu term for an escheat or for land whose owner has disappeared (gáyá, gone) is, I believe, "gáyúri." The Muhammadan Government claimed the same right; hence the more recent term for it, of Arabic origin, has come to be the one commonly used.

(or as long as the sentence remains in force), any property he would otherwise acquire (as, *e.g.*, by inheritance) goes to Government[8]. During war (as after the Mutiny of 1857) estates may be forfeited from chiefs or others who took part against the State, rebelled, or otherwise offended against the Sovereign power. Such deprivations are acts of State beyond the cognisance of the ordinary law administered in times of peace; but they are spoken of as "forfeitures," especially in the case of petty estates or chiefships.

§ 3.—*Sale for arrears of Revenue.*

In some cases land has become the property of Government by having been put up to sale for arrears of revenue, and no one having bid, the land has been bought in for Government. This was especially the case in the early days of the Permanent Settlement of Bengal. At the present day such sales more rarely happen, and in many provinces the law permits the sale of land for arrears of revenue only in the last resort.

There are also, in various provinces, estates or lands to which at former settlements no one appeared to be entitled to be called proprietor; these practically became Government estates, and were managed (as it is called) "khás."

§ 4.—*Property of former rulers.*

In some places there are also houses and lands which have become Government property, because they were the property of the former Native Government[9]. In the same way some tracts of land, which are now under the Forest Act, may have been acquired.

In the old days, Native rulers used often to set aside considerable areas of land as "Shikárgáh" or hunting grounds, and these would be usually covered with thick, and perhaps valuable, forest. Such lands have now become the property of Government, following the principle of succession which I have indicated.

[8] Indian Penal Code, section 61.

[9] In such cases also the term nazúl is commonly applied.

§ 5.—*"Royal" trees.*

In the same way *teak* trees in Burma are the property of Government, and so is *sandal wood* in Southern India[10]. I believe that black-wood and some other kinds were considered royal trees in the Bombay presidency. It is questionable how far the Himalayan cedar (*Cedrus deodara*) comes under the same category in the districts where it grows.

There are many instances in the Panjáb (and, perhaps, in other provinces) where Government claims standing trees of other kinds, but this may be owing to the action of officers at our early settlement. The whole waste area might have been considered as Government property (on grounds we shall presently notice); but it was thought that the surrounding villages had some equitable claim, or it was necessary for their welfare to leave the waste open to their use and so the waste was not reserved, but only *the trees on it.*

§ 6.—*Land acquired by alluvion.*

There may be another way in which Government becomes possessed of land, and that is by river action.

In many parts of India the rivers are of great size: they have no banks, throughout their course, as in Europe. The fact is that the great Himalayan rivers are discharged on to the soft alluvial soil of the Gangetic plain, the Panjáb and other like countries; and the "river bed" really is only a broad ill-defined strip of country over which, during the season of snow-melting and summer rain (May to end of September), the full-fed torrent is accustomed

[10] There exist patents or sanads of the former rulers granting the right to all sandal trees to the East India Company in Mysore, &c. In Madras and elsewhere the monopoly of sandalwood *on private lands* has been more or less abandoned. But it is evident that the old Hindu princes claimed *all* sandalwood (see Buchanan's Journey through Mysore, Vol. II, 334). By treaties in 1766 and 1770, the East India Company obtained the right to purchase and export all sandalwood in Haidar Ali's dominions (Aitchison's Treaties V, 255). In 1790 Tipú Sultán issued orders for the preservation of sandal, and ordered a fine of Rs. 500 on any one who should cut it without permission. When sandal was taken from gardens and apparently from cultivated lands, it was customary to make some payment, not as acknowledging any right, but as a gratuity for having reared and protected the tree.

to spread; while during the rest of the year, a stream of water only meanders more or less sluggishly along the lines of lowest depression in the area. Lands fronting on this river bed or flooded area, are naturally liable to constant changes; the soil is cut away in one place and re-deposited in another, while islands are frequently thrown up in the river bed. Under certain circumstances, according to the particular law or custom of alluvion in force at the place, such islands may be the property of Government, and this proprietary right has been made use of in the Panjab to form some valuable fuel and timber plantations[1].

An island naturally formed, in a river, is held to be the property of Government, if the channel between it and the land was not fordable when the island appeared. This would not apply in cases where the island was formed on the proved site of some estate which had once existed, but had in the course of time been encroached on and covered by water, nor where, owing to the river dividing its stream, a portion of a known estate has become an island. If Government owns land on the river edge, land gradually washed up and forming an extension to it, would become part of the Government property[2], just as it would in the case of a private estate.

If a river deserted its bed, the land so left bare would belong to Government only on proof that the river bed had originally belonged to Government.

At the time I am writing this, the law on the subject is still to be found in Regulation XI of 1825, which, however, gives validity to any proved *local custom* on the subject, such custom prevailing against the principle otherwise laid down by the Regulation. This law will, it is hoped, be soon replaced by a more

[1] This was at an early date encouraged by Circular orders.—See Financial Commissioner's Circulars of 1863 and 1864.

[2] And this depends on whether the river which runs along the front of the estate is really in its natural bed, or is flowing over what was once another estate but has become submerged. For it was decided in a well-known case in the Privy Council (*Madan Thákur* v. *Lopez*) that in such a case the newly-formed land was really the re-appearing of the former estate, and then the land would belong to the owner of that former estate.

systematic one, which will limit the force of custom, when the custom is unsuited to the conditions of modern times. The principles above stated are, however, general, and will, I think, be found to conform as well to the new law as to the Regulation.

§ 7.—*Mineral Rights.*

The general right of Government to minerals—which term includes not only mines but all products below the surface—has been the subject of much discussion. The question has, however, been settled by a despatch from the Secretary of State[3].

In England, by the Common Law, all proprietors of land own (as we have seen) everything up to the sky and down to the centre of the earth, except gold and silver mines, which, by prerogative, belong to the Crown. But in a ceded and conquered country like India, this English Common Law and Crown prerogative does not apply, at any rate beyond the limits of the Presidency towns.

It is also a principle, as we have seen, that under existing rules of international law, conquest does not operate to alter private property in land. If, therefore, it could be shown that under any form of landholding in India, there was such a recognised property as naturally included mineral rights, then such rights would belong to the estate. But such a right it is difficult to make out. In the first place, as most mineral deposits exist in hill ranges and other places which are waste and unoccupied, they will remain vested in the proprietor of the waste, and that waste is the property, in the absence of definite grant or other specific claim, of the State. But in occupied lands, the matter is not clear. We have to consider what proprietary right really was, if any existed under the Native law, and what the effect of modern settlements and recognitions of right in land has been[4].

[3] No 35, dated 25th March 1880.

[4] In Madras, it has been held that raiyats have a full property in the land, and that, therefore, mineral rights vest in them. This, however, seems far from clear as regards raiyatwári holdings, and cannot be regarded as settled till we have a judicial decision on the point. The State has certainly taken a royalty even in the strongly-owned "janmi" lands of Malabar.

Under the Native law, the right to minerals seems not to have been definitely settled. Under Hindú law, Manu's Institutes lay down the rule, that half the produce of mines belongs to the king: and the Muhammadan law (Hidáya I, Chap. V) appears to recognise the right of the soil-owner, but the State may impose a tax on the mineral produce. Notwithstanding this, the whole subject of property in land under the Native system was so little defined, that it was necessary for the British Government to confer such rights. It is true that in some cases the right is recognised in general terms, so that it is still open to argue that certain rights do or do not form part of the proprietary right recognised. But the English Common Law principle not being in force in India cannot be invoked, as a matter of course, to show that every one, who has a property in the soil, necessarily has mineral rights also. Hence the following general conclusions gathered from the despatch of the Government of India in 1879, and approved (with the modifications introduced into the text) by the Home Government in 1880, may be stated with confidence :—

(1) In permanently-settled estates in Bengal, Madras, Oudh and elsewhere, the right of the zamíndár to minerals is admitted; because even if it were open to question (and opinion is not quite unanimous on this point) it would be impolitic to question it.

(2) In non-permanently-settled estates (raiyatwár lands, village estates and other), where there is no specific provision of the legislature, there is no general rule as to mineral rights. Even in different parts of the same province, the law and facts in the matter may be different. When the question arises in each province, it will have to be answered for that province only, in accordance with the practice of Government, and with judicial (or other) precedent. But the Secretary of State has added that, as a general rule, unless there is any distinct judicial precedent, or proof of established law or practice, the

mineral rights should be presumed to belong to the State[5].

In connection with this, it may be stated that in the newer provinces it has been found possible specifically to settle the point. Thus the right of the State to minerals (to a greater or less extent, the precise words of the law must be referred to) has been declared by law in Bombay[6], the Panjáb[7], Ajmer[8], Central Provinces[9], and British Burma[10]; there seems also, to be no doubt about it in Assam, and it will be probably there declared in the proposed land and revenue Regulation.

In the North-Western Provinces, the matter will have to be settled on the principle stated, and I believe it is intended at revised settlements to introduce clauses in the records, which will settle the point at least as regards new mines. In the alluvial plains, the matter has very little importance, and the only mineral deposits of consequence are in Kumaon, where reservations in grants of waste land probably do all that is required.

(3) In waste lands, the right to minerals remains with the Government, and it is held that grants in waste which do not specifically include mineral rights, do not avail to pass such rights, except in the case of those absolute grants spoken of as "fee simple" grants. In all modern leases and in modern revisions of the rules, as, for example, in Coorg, Assam, Kumaon, and other parts, a reservation of the Government right to minerals is specifically made.

[5] This seems to be the reasonable conclusion. There may be some general right in land, but we know that it was legally very ill-defined under Native systems. Our Government has desired to concede to the landholders whatever they are equitably entitled to, but it is obvious that Government is the natural owner of all residuary rights that are not shown to vest in the holder of private lands.

[6] Act (B) V of 1879, section 69.

[7] Act XXXIII of 1871, section 29.

[8] Regulation II of 1877, section 3.

[9] Act XVIII of 1881, section 151.

[10] Act II of 1876, section 8.

SECTION II.—OWNERSHIP OF PUBLIC LINES OF COMMUNICATION (LAND AND WATER).

§ 1.—*Roads and Railway lines.*

It will be desirable next briefly to notice the right of ownership in lands occupied by canals and other public works, by railways and public roads[1].

Railways made and worked by Companies are owned by the Company, but the land may have been acquired by public authority under the Land Acquisition Act, and in that case there is a special agreement between Government and the Company as to the terms of holding[2]. This agreement secures, with the force of law, the terms on which the public will be entitled to use the railway or other works.

Public roads are distinguished from mere rights of way which one man (or several, or a community) may possess over private property. The enjoyment of the use of a public road is a right which belongs to the public at large.

The road itself belongs to Government, as is clear from the general law. I pass over the technical question as to whether the possession of the Government on behalf of the public is not "adverse" and so becomes prescriptive in the course of years; and here merely observe that Government exercises, by legislation, a right to regulate the use of all such public ways. It enacts

[1] The Bombay Code (section 37) specifically declares that all public roads, lanes, paths and bridges, ditches, dykes, fences on or beside the same, the bed of the sea, and of harbours and creeks below high-water mark (*i.e.*, the highest point of ordinary spring-tide at any season of the year), the beds of rivers, streams, nallas, lakes, tanks, canals, water-courses, and all standing and flowing water, and *all lands* wherever situated which are not the property of individuals or aggregates of persons legally capable of holding property, are the property of Government, and may be disposed of by Government officers, subject to rights-of-way and other rights (not being property rights) subsisting on it.

[2] Act X of 1870, section 49. The agreement has to be published in the *Gazette of India* and in the local *Gazette*.

Railway Acts[3] and laws for levying tolls on roads[4]. Many roads are old Imperial lines, which have been public property for generations past; and whenever a new road or State Railway is made, the land is acquired by public authority and paid for out of public revenues, so that no possible question can arise about it. I may also mention that it is a well-known principle of law as establishing the State ownership of public roads, that *no private individual* can bring a suit to remove an unauthorised obstruction, even though he own land on both sides of the road; unless, indeed, he can show some special damage to himself over and above the general inconvenience[5].

Bridges constructed at the public expense over rivers, &c., are evidently part of the road and governed by the same principle.

§ 2.—*Canals and the right to water.*

The beds of canals and their inspection roads, spoil banks, &c., are all on land which was either Government property under the former Native rulers or has been expressly acquired in our own times. The preamble to the present North Indian Canal Act (VIII of 1873)[6] therefore contents itself with asserting the right of Government to use and control the water of all rivers and streams flowing in natural channels, and of all lakes and natural collections of still water[7]. The power to remove obstructions in rivers is also

[3] Act IV of 1879.

[4] Acts VIII of 1851 and XV of 1864.

[5] See Civil Case No. 72, "Panjáb Record," 1877. The whole question has been exhaustively examined, and all English and other authorities reviewed, in *Satku* v. *Ibrahím Aga*, I. L. R. Bombay series, II, 457.

[6] See also Bengal Act VI of 1876, and Canal Acts of Bombay and Madras.

[7] This is an improvement on the former Act (now repealed) XXX of 1871, which declared a right "*to all rivers and streams.*" Such a declaration is not very clear. As regards its scope, does it include the soil, or the water, or both? Now, in any case of a great river (not being a mere creek or stream which may traverse a man's estate) as long as the river is flowing, the bed generally belongs to Government, because the soil of it never can, in the nature of things, have become private property, or been recognised as such by a settlement or otherwise. The Government may then deal with the bed by constructing bridges (sinking shafts into the soil for

declared by Act VIII of 1873. *Navigation* is also provided for, and tolls on rivers are levied by public authority (*e.g.*, Act I of 1867, North-West Provinces). *Ferries*, when they are of a public nature, and not merely crossing-places used by individuals or the inhabitants of a village, are also regulated by public law[8]. Government, under the Forest Law, also asserts the right of control of rivers and their banks, or so far as concerns the transport of timber.

SECTION III.—STATE RIGHT IN WASTE LANDS.

§ 1.—*Origin of the right.*

Students of the *Revenue Manual* will recollect that one great feature in all land-revenue settlements is the recognition of a proprietary right, or at least of a heritable and transferable right of occupancy, in land.

But in all cases this went no further than the land which was really and fairly *in possession*: it did not extend to the whole area of the district or province, part of which, at least, was not in practical possession of any individual or community.

It is true that there may have been in many cases a *de facto* possession of land not actually brought under cultivation; and although the ascertainment of the fact of possession might be in such cases attended with difficulty[9], still the Settlement Officers found means to determine the matter practically and equitably, if not on any very definite theory.

the purpose), or erecting spurs and works to regulate the flow of the water and maintain the channel, &c. But there are many cases in which private rights exist in the soil over which a river may be running; and perhaps such rights may extend over the whole bed.

[8] See Act XVII of 1878 for Northern India; Regulation VI of 1819, and Bengal Act I of 1866; Bombay Act VII of 1879; Act II of 1873 for Burma; Madras Act I of 1873.

[9] Because it is by no means true that you acquire such a hold over waste land that you ought to be recognised as proprietor, by merely using its surface products, as, *e.g.*, by letting cattle graze, taking leaves for manure, or even cultivating portions of it for a short time only. The principle involved was fully discussed in the last chapter.

But whether it was actually cultivated land or not, our law only professed to recognise a right resulting from *actual possession*. Of all other land, there can be no doubt that Government is, by law and by ancient custom, the proprietor. The Native Governments always and uniformly asserted this. From the earliest times the Hindú Rája owned the waste. A strong customary title arose in land in favour of the clearer or occupier: but what was uncleared remained to the Rája; he gave his grant or "birt" for its occupation, and he derived revenue for the jungle produce as long as it was unoccupied. If a grantee or a village headman, or a family group of landholders, got the full right (what we should now call in India, the zamindárí right) over a defined area, the grant specifically included the waste and woodland which was situate within that area. Nor was this right in the land altered by the advent of the Mughal rule[10]. The State, as before, made grants of waste land; and in such cases the grantee was always held, in after times, to have one of the most indisputable titles; because it was certain he had not dispossessed any one else. Whenever the Government granted the right of collecting revenues over an entire area of land to a "zamíndár" or other person, such grantees always had the right of disposing of the *waste* portions of their grants as they pleased, and this was distinctly in virtue of the State right which was conceded to them.

§ 2.—*The right declared by law.*

This right has descended to the British Government. Not only is it practically assumed in all cases where Rules for settle-

[10] In the Kanara case (I. L. Rep., Bo. High Court, vol. III, pp. 583-4), Mr. Justice West (in considering whether the plaintiff had established a claim on the waste) said that under British rule "the principle from which we must start is that waste lands belong to the State." By Muhammadan law, it was observed, waste which had not been obtained by a proper application or an engagement to cultivate, remained the property of the State; and although it is possible that by *acquiescence* the Government might have allowed a private title to *grow up*, it must be acquiescence in what was, on the face of it, a *permanent* occupation of the land, not a mere casual use of it. It is exactly on this principle that the Regulations of 1819 and 1828 proceed.

ment have been made, determining what amount of waste shall be, and what shall not be, included in private estates, but it is expressly declared in some of the earliest Regulations made for Bengal, in which province our first direct dealings with the land as a Sovereign Power, began. Thus in Regulation III of 1828[1] mention is made of extensive tracts of country "unowned and unoccupied at the time of the perpetual settlement which are now liable to assessment, *or, being still waste, belong to the State.*" Besides the declaration in the Regulation of 1828, there are numerous other declarations in more modern Acts, which either express or directly imply the Government ownership of all waste land.

The preamble to the Waste Land Rules of Oudh (1865,)[2] though not law, still publicly and authoritatively asserts, as a fact, that "under the Native Government all unassessed waste lands in the province were held to be the property of the State," and that the "right has devolved on the British Government and been recognised and acted on by it since annexation."

The North-West Provinces Land Revenue Act makes a declaration of Government right in all waste not included in any private estate[3]; the Bombay Code does the same[5] and the Panjáb Act[4] makes, by direct implication, a similar claim. If it is asked why a specific declaration was not repeated in the Act XXIII of 1863, which specially provides for settling "Claims to waste lands," it may be answered that that Act was passed when a large proportion of the provinces had already come under settlement, so that there was

[1] *Section 1, clause* 2.—These terms are quite general, although later on in Regulation the same assertion is repeated with special reference to the Sundarbans of Bengal.

[2] Notification of Government of India, May 25th, 1865.

[3] Act XIX of 1873, Section 58.

[4] See Section 37 of Bombay Act V of 1879.

[5] Act XXXIII of 1871, Section 28; compare also Act IV of 1872, Section 48. The subject is not mentioned in the Oudh Act, because the question was disposed of, and the waste cut off that was not to belong to the estates settled before settlement began. So in the Central Provinces, the Act only takes notice (section 151) of claims regarding waste land that had been disposed of at settlement, to bar them after three years from date of settlement.

no express occasion to declare it; moreover, as the object of the Act was specially to protect possible rights and claims of private persons over waste from being over-ridden in effecting Government sales and leases of such lands, it was not the place in which to repeat such a declaration.

The right of Government to all waste land not owned or occupied in practically proprietary right, may then be taken as quite beyond dispute.

§ 3.—*Allotment of waste to villages.*

The detailed history of the disposal of waste at settlement, in the different provinces, will be found in the *Revenue* Manual: here I may just indicate that, in pursuance of this right, the Government disposed, at or before the settlement, of whatever questions existed about the ownership of the waste. In the North-Western Provinces the waste was in most districts found to be included in the known area of village estates. It was accordingly conceded to them, and so recorded. In the rest of Upper India, it was not so, and Government then granted to, or included in, each estate, a convenient area of waste, both for use as pasture land and to allow for the due expansion of cultivation.

Under the settlements of Bombay (including Berar) and Madras, in which the Government deals with individual holdings and levies its assessment on them, waste is differently treated. It may either (1) form small plots numbered in the survey, and available to be cultivated; or (2) form larger plots of "unassessed waste," or (3) may lie in great jungle tracts or hill ranges, which are separate entirely from the country which the survey has dealt with for revenue purposes. Grazing ground and jungle (to be kept as such) may have been given over to the villages; but no large area of waste for additional cultivation is added as under the village system, because the settlement does not deal with villages but with individual holdings, and the waste, whether assessed or not, lies there at the disposal of Government. Anybody, however, is at liberty to apply for it and get

a right of occupation, on the sole condition of using it for the purpose for which it is conceded and paying the assessed revenue. But no one can take up such waste without a due and proper permission, and the law renders any unauthorised appropriation penal.

In Bombay, under the present survey system, there is no possible doubt as to what is waste at the disposal of Government and what is not.

Under the Madras system the question of the waste is by no means so clear[6]. Nor is unauthorised appropriation of waste prohibited, except by the levy of a somewhat higher rate of assessment. In cases where the survey has not come (and there are many), the distinction between waste at the disposal (to some extent) of the State and occupied land, is ill defined, and there would probably be some difficulty in saying what was waste and what was not.

In the sequel, I shall be understood to speak only of the waste *which was not included* as part of a village or a privately-owned estate, and which, consequently remains, generally, at the disposal of Government.

With regard to this waste area which, in several provinces, is of enormous extent and great capabilities, there have always been two important interests to be consulted. One is the reservation of a sufficient portion of the waste as State or village forest for timber, for fuel, or for grazing ground; the other is the due extension of cultivation and the consequent increase of revenue and progress of civilisation generally; for civilisation always progresses along with cultivation, which itself implies new roads, the building of new villages, diminishing the domain of dangerous wild animals, and augmenting the means of subsistence for a growing population.

[6] At the time I am writing, the question is under discussion. At one time the view was advocated in Madras that the waste belonged to the villages—how, or on what principle was not clearly said. Possibly it was only meant that the villages had strong claims to rights of user in the jungle. It will probably require a careful local examination and a classification of the waste into (1) what is suitable for State forests, (2) what should be formed into village forests, (3) what should be left for grazing land, or for extension of cultivation, before the waste question will be practically set at rest.

§ 4.—*Waste Lands Minute (1861) and Rules.*

Both objects were fortunately well kept in view when Lord Canning wrote his famous Minute of 1861[7]. Before that time, the various provinces had each a procedure of their own for making grants of waste; and sometimes these grants were rather to be deplored than otherwise. But it was in 1861 that the subject first came prominently to notice and took definite shape. Under the orders then issued by the Government of India, the local Governments in every province were directed to prepare revised rules for the *sale of waste lands* on favourable conditions.

The local Governments were, however, directed to exclude from the list of lands available, those which were likely to be wanted for public or other special purposes, such as grazing grounds, forest lands, or fuel reserves, or sites of stations or for building lots; this done, all other waste lands might be sold without reserve.

In the *Panjáb, North-West Provinces* and *Oudh*, the rules clearly specify the principle on which waste is available for sale or lease.

In *Bengal* the rules expressly define the waste which is available to be brought under cultivation so as not to include land wanted for forests[8], or for grazing grounds or for fuel reserves, and wisely reserve also, a strip 60 feet wide on either side of every considerable public road (in cases where such roads pass through land available for granting out).

In the *Burma* rules a list of places likely to be wanted, and therefore not available for sale, is given.

In *Berar* the rules have been quite recently revised[9]. In this province the settlement system being "raiyatwári," the districts generally, excepting the Melghát hill-tract, were surveyed and

[7] Resolution (Government of India) No. 3426 of 17th October 1861.

The Secretary of State in 1862 modified these orders so far as concerned the proposal to fix an uniform price for land, but otherwise they were approved of.

[8] See Whinfield's Revenue Hand-book, Bengal (Calcutta, 1874), p. 227. It is usual in most places, when any large area of waste is to be disposed of, to consult the Forest Department as to whether the land is likely to be useful for forest purposes, before it is offered for sale, &c.

[9] Resident's Book Circular XXIII of 1880.

parcelled out into revenue-assessed fields or "numbers;" but even then, whenever there was an available area of waste of any extent, that waste was thrown into large blocks under one number, so that a whole area known by one local name would often form a single group or a "waste village." This occurred almost exclusively in the Wún and Basim districts, to which the rules now apply. Casual waste plots in the midst of settled villages are not dealt with under the Waste Land Rules, but under the ordinary revenue rules. The Rules are (as usual) expressly declared not to apply to any forest reserves; and not only so, but if a waste block put up for lease contains valuable timber, the part containing such timber is understood to be excluded from the terms. In all cases "mohwa," "mango," and "tamarind" trees must be left standing in clearing the land for the plough. In other respects the lessee has a right to enjoy the forest produce of the uncultivated parts of his lot, but must submit to any rules about "passes" for produce taken for export or sale beyond the limits of the village or area leased. There are various other details in the Berar Rules different from what are found in other provincial rules, partly because such matters find a place rather in the Revenue Acts and Rules of these provinces, and partly because the land system is different.

These various rules, however, all agree in this, that they apply to tracts not cultivated, and which Government desires to see settled and cultivated; they expressly exclude those tracts which Government desires to keep for other purposes, and notably for forest and grazing land.

The Rules also describe the method in which notice is given of the intention to lease or sell; how the plots are to be surveyed; how people may apply for plots before they are, or without their being, advertised for sale; how the purchase-money is to be paid; and what are the conditions of sale, and so forth.

There is no occasion for the student to go into details on the subject. All rules before 1861 were of course called in and revised; and now (with the exception of any rules newly issued or amended since 1868) all the existing rules may be found in a col-

lection printed by the Government of India in the Home Department in 1868.

Of late years the 'sale' of waste land in 'fee simple' as it was (unfortunately) called, has been stopped; the present method of disposing of waste lands, is to issue 30 years' leases, which are put up to auction at an upset price, and certain progressive revenue-rates are fixed. At the end of 30 years, a permanent title is acquired, subject to payment of the ordinary land revenue, and to certain other conditions.

§ 5.—*Claims to right in waste lands.*

In order to prevent any inconvenience which might arise from claims being made by private persons in respect of lands offered for sale or lease, an Act was passed for the speedy adjudication of such claims by special procedure[10].

It is not necessary to refer to the details of the Act for the purposes of this section; as a matter of fact, I believe its provisions have been little, if at all, called into play. The Land Revenue settlement usually disposed of all claims to waste in which there was any real question of private interest, and the great tracts of waste in the hill ranges and remoter parts of the country, which were available for settlers, were not likely to be subject to claims on them of a nature which the Act would apply to. I never heard of a case under the Act in the Panjáb; but I cannot speak so confidently of other provinces.

§ 6.—*Right to the waste enables Government to form State forests.*

A very important consequence flows from this general right of the Government to unoccupied waste, and from the care which has been taken not to alienate all the waste exclusively in the interest

[10] Act XXIII of 1863. It may be asked whether this Act might not be applied to settling claims in the case of lands taken for forest purposes; but I think it only applies to cases where the land is *about to be sold* to private persons; moreover, as the Forest law provides a procedure expressly for dealing with claims to rights of user or interest of any kind in lands to be placed under the forest régime, it is evident that the special Act would govern the procedure even if the other were technically applicable.

of cultivation. It is this, that practically, as far as the provinces directly under the Government of India are concerned (and in Bombay also), the general right in question has been found *to be a sufficient basis for a* Forest Law. In other words, the right of Government in waste land, has been found, as a general rule, sufficient to enable Government, without real hardship to any one, to constitute a large area of State forests for the public benefit. All the public forests, I may say, in India, were originally uncultivated "wastes," whether in the hills or plains, whether naturally "forest" or mere scrub or barren land improved by closing or artificial planting; and the right to place these under the forest *régime*, depends, in the first instance, on the general right above indicated.

Nor was it necessary that the right of Government should be absolute,—that is to say, unrestricted by rights of user. In some instances the Government had not taken sufficient notice of the subject, in former days, to have maintained an unburdened right in the waste; it had let rights of user grow up, and consequently had its own right limited thereby; it had only retained, in the eye of the law, something less than an absolute or full property, and therefore some forest consists of lands in respect of which Government is obliged to recognise other rights besides its own.

But in such cases the *property in the land* itself, remains to Government, though certain rights of user belong to the people, and consequently the estate can be made a forest, though the common rights of the people have to be fully provided for or bought out, by the various means which it is the business of the Forest Law to define and prescribe.

There have been also cases in the Panjáb, and possibly in other places, where the Government have distinctly recognised a right in, or granted away, all the waste, keeping only a right to trees, or certain kinds of trees, in their own hands. Here, if it is desirable to effect a reservation of forest under State management, it has to be done under special provisions[1].

[1] These special cases will be fully dealt with in the sequel.

SECTION IV.—OF THE ACQUISITION OF LAND FOR PUBLIC PURPOSES.

§ 1.—*Object of the Law.*

It is a general maxim that private right has to give way where the public welfare demands it; but under any ordinary circumstances, if the public welfare demands that private property be converted to a public use, a fair and full compensation must be given.

It is necessary that this subject should be dealt with by law, *first*, because we want it to be settled what *is* a "public purpose" and who is to be the judge of the necessity for acquiring the land; and next, because when the question of compensation comes up, there are various interests requiring to be kept in due restraint. For instance, there is the temptation to the owner to put an extravagant price on his property, and the probable inclination on the part of the jury or arbitrators, to be over-liberal in awarding payment which will come out of the Government treasury, whereas in truth, as the money paid comes out of the public pocket, it is the more particularly necessary to see that while the owner is fairly treated, the public is not overcharged.

Again, in connection with the grant of compensation arises the important question, what *is* a fair amount? what circumstances giving value to the property ought to be taken into consideration, and what excluded? I may have a private garden, which I would not sell for ten times its market value; am I to be allowed anything for the loss as it affects my feelings, or am I only to get the market value? Lastly, what is the best procedure to adopt for hearing and deciding claims? These and such like matters are, therefore, settled in all civilised countries, by law. In India they are now provided for by the Act X of 1870, "The Land Acquisition Act." It is of general application and is extended to Berâr[2].

[2] Notification of 4th July 1870. Note to Legislative Department edition of the General Acts.

The term "land," it is to be borne in mind, includes benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth.

It must, therefore, include houses[3], rights of occupancy in land, rights to a water-course, to pasture, and to jungle produce, &c., &c.

§ 2.—*Procedure.*

By section 4, the Local Government may issue a notification that certain land is *likely* to be required. When the notification is published, power is given to the proper officer to examine the place, survey, dig or bore into the soil, and do all other acts necessary to ascertain whether the land is adapted for the purpose. He may place marks to indicate boundaries, levels, &c., and if *necessary*, he may cut crops or clear away jungle. But compensation for such preliminary acts has to be made.

When it is determined that land *is* required either for Government or for a Company (registered in India or constituted by Act of Parliament or Letters Patent), a declaration to that effect is made by Government under the signature of a Secretary or some officer authorised to certify the orders of Government. The declaration, when made according to law, is conclusive proof of the public necessity, and that the purpose is a public one[4]. The declaration has to be published in the Official Gazette, and must state the district or other territorial division in which the

[3] The Act requires that if a house, building, factory, &c., be taken, it must all be taken if the owner so requires—not merely a part (see section 55). The Act only applies to land and things on it, for the occasion can really never arise that Government should require to take people's movable property.

[4] The Forest Act VII of 1878 expressly declares that if land is wanted for a timber depôt, a plantation, or for any of the purposes of the Act, this is to be deemed a public purpose (section 83). Such a declaration is, perhaps, hardly necessary, since the Land Acquisition Act itself makes the declaration of Government that the land *is* wanted for a *public purpose*, final; so that if Government were to judge that any purpose whatever was a public purpose, and to make the declaration accordingly, there would be no calling the declaration in question (section 6). Where land is wanted for a *Company*, there are certain conditions to be fulfilled, for which the Act must be referred to.

land is situate, the purpose for which it is needed, its approximate area, and, when a plan shall have been made of the land, the place where such plan may be inspected.

The Local Government may now proceed to acquire the land. The Collector (Deputy Commissioner of a Non-Regulation District) is the official who takes order for acquiring it.

Public notice[5] is given at convenient places on or near the land that it is about to be taken possession of, and that claims to compensation should be sent in to the Collector. On the day fixed, the Collector takes the claims into consideration.

He first makes a summary enquiry, so as to fix what appears a reasonable compensation; this he tenders. If the parties attend and agree to the Collector's proposal, the latter makes an "award" accordingly, and there is an end to the question of compensation: otherwise[6] the matter has to be referred to "the Court[7]" for determination.

Two assessors, one chosen by the Collector, the other by the interested persons, are to be appointed to aid the Judge in deciding the compensation.

§ 3.—*What is to be compensated for.*

The Act prescribes what points are to be taken into consideration in awarding compensation, and what are not[8].

Generally speaking, all direct loss that is caused by taking away the land from the owner's other property, is compensated as well as the loss of the land itself. Among things *not* compensated are improvements purposely made with a view to claiming an excessive price, and the "fancy value" or *pretium affectionis* which an

[5] Section 7.

[6] For details as to the precise circumstances, see the Act itself.

[7] The "Court" is, in all Regulation Provinces, and also in British Burma and Sindh (the Zila Judge or) the principal Civil Court of original jurisdiction, and in the Non-Regulation Provinces (other than British Burma and Sindh) the Commissioner's Court, by definition in section 3.

[8] Sections 24, 25.

owner may be disposed to put on his land beyond its market value[9].

In fixing compensation, it can never be *more* than what is claimed or *less* than what is offered by the Collector on behalf of Government[10]; unless, indeed, the person has, without reason (of which the Court is to judge), refused or omitted to make a claim; then the amount may be less than the Collector's tender, and of course cannot exceed it.

If the Court and one or both of the assessors agree as to compensation, there is an end of the matter.

If the Court differs from both the assessors (whether they agree with each other or not[1]) the Judge's opinion prevails; but there is an appeal on the part of either the Collector or the claimant to what is (rather curiously) called the "District Judge." I say curiously, because in Regulation Provinces the Court is itself that of the Zilá or District Judge, and the appeal would lie to the *Civil Judge* (of the division). In the Non-Regulation Provinces, where the "Court" is that of the Commissioner (except Burma and Sind, where it is the Deputy Commissioner) the appeal would lie to the High Court[2].

In any case, if the proposed award exceeds Rs. 5,000, the appeal is to the High Court. Speaking generally, the Civil Procedure Code governs the proceedings[3].

There is no other way of contesting an award than the appeal just mentioned, and a civil suit cannot be brought to set it aside[4].

[9] The *disinclination*, though not allowed as an item *in the valuation*, is practically allowed for afterwards, since, by section 42, the Collector pays an additional 15 per cent. on the amount awarded, in consideration of the compulsory nature of the transaction.

[10] Section 26.

[1] Section 30, see note to Legislative Department edition of the Act (General Acts, Vol. 2, page 1234).

[2] Or the Chief Court of the Panjáb.

[3] Section 36.

[4] Section 58. As to *costs* the Act itself must be consulted.

There must be no delay in paying after possession is taken, or interest at 6 per cent. begins to run[5].

§ 4.—*Acquisition by consent.*

It is also practically important to public officers to observe the difference between taking up the land they require by *consent* or private *agreement*, and by operation of the Act. In the latter case they get the land on an absolutely clear title and free of all incumbrances[6]. In the former, they take it with its incumbrances; so that, although taking by private agreement saves a good deal of trouble, this method should only be adopted when there is *no risk of any defect* in the title, or of there being any incumbrance.

§ 5.—*Local rules of procedure.*

All the provinces have local rules (in circulars issued by the Board of Revenue, the Financial Commissioner, or other Chief Controlling Revenue authority). These prescribe the form in which public officers must report to Government when they require to take up land, and the details necessary to be submitted. Every officer will therefore refer to his Provincial Circular (as well as to the Act itself) for practical guidance in any actual case. There is often much work for the Collector to do (sometimes requiring the services of a special officer) not only in awarding compensation, but in determining the deduction from the revenue roll which is to be made consequent on the expropriation of the land. These matters are dealt with in local revenue Circulars.

This brief account is only designed to familiarize the student with the principle that the public necessity may override private property rights, and to tell him the main outlines of the procedure by which compensation is awarded, and disputes regarding the amount of it settled.

[5] See Section 42. Of course if there is an appeal, the time for that must expire first.

[6] Section 16.

PART II.

THE FOREST LAW.

CHAPTER IV.

FOREST LAW IN INDIA.

SECTION I.—THE REASON FOR THERE BEING A SPECIAL LAW RELATING TO FORESTS.

§ 1.—*The question stated.*

FOREST law consists of a series of special rules which it is found advisable to enact by the authority of the legislature, (1) for the protection of certain estates or properties called "Forests" (and may include protection of timber or other forest trees, and natural produce, generally, in lands outside the forests properly so called); and (2) of produce while it is in transit to the market or place of consumption.

Why should forests, and their produce in transit, be under a special law? Even in a country as little advanced as India, there is no such thing as unowned land, or forest-clad hills and jungles which belong to nobody. There is, therefore, no part of the provinces which form part of British India which is outside the pale of the ordinary law in any way; mischief (including mischief by fire), theft and trespass, for example, can be punished under the Indian Penal Code[1]. These legal provisions are applicable to forest cases; indeed, as they provide heavier sentences than the Forest law does, they may be very necessary in grave cases; but notwithstanding this, it is found better to put forests under a special law. The reasons for this are the following.

1 See sections 379, 425, 435, 441, &c. This subject will be gone into in a later chapter.

§ 2.—*Condition of forests in respect of rights of user is exceptional.*

In the first place, in a very great number of cases, the estates put under forest management will, owing to circumstances we shall afterwards examine, be found to be burdened with rights adverse to the public interest represented by the Government. It is necessary to provide for the due separation of the rights of the State and those of individuals, in order to prevent hardship to the individual on the one hand, and the destruction of the forest to the prejudice of the State on the other. For this purpose provision has to be made for determining claims for compensating rights in case they are incompatible with the existence of the forest, and for the proper regulation of the rights that exist, as well as to prevent their further growth. Such rights are not found—to anything like the same extent—in other properties, nor do they interfere with the management.

§ 3.—*Forest subject to variety of injury and difficult to protect.*

In the next place, there are so many different things included in a forest,—the soil, the grass, the undergrowth (bamboos and brushwood, &c.), the trees and all the parts of a tree—each liable to its own special injuries, that the acts of evasion of dues, petty theft, trespass, and mischief which constitute "forest offences" are extremely various; and it is much simpler to specify them distinctly in an Act, than to leave them to be, by explanation, and, perhaps, by highly technical argument, brought under the general terms of the ordinary law. No such difficulty arises with an orchard, a cornfield, or a garden; the purposes to which these are put are single, and the possible offences directly connected with them comparatively few, and such as are clearly covered by the terms theft, mischief, cattle-trespass, and so forth, of the ordinary criminal law.

Moreover, these properties are usually of small, or individually limited, extent; they can always be protected by gates and fences, which, on the ground of expense, is not always possible in the vast area occupied by natural forests.

§ 4.—*Forests vulgarly regarded as common property.*

There is also another and more important reason why the protection of forest estates is more difficult than that of other properties. The most illiterate peasant understands and feels that a cornfield, a garden, or a fenced orchard is not his to do what he likes in or with. But with a forest it is different. The habit of looking on forests as if they were "every man's" or "no man's" property is inveterate, and hence the temptation to acts of mischief and trespass which, if unrepressed, would seriously interfere with the management of the forest. To check such offences it is therefore desirable to make it clear to the public, what may not be done in a forest, and in set terms to prohibit acts which, if considered strictly and theoretically, may be already unlawful[2].

§ 5.—*Simple and summary penalties need to be specially provided.*

Not only is it very convenient that offences against the forest and its produce, and all breaches of such prohibitions, should be specifically catalogued by the law, but it tends to fairness as well as to effective repression of offences of this kind (which are generally petty in detail, though, of course, very troublesome in the aggregate), that they should be liable (in ordinary cases) to small penalties, which can be "summarily" inflicted, that is, after a speedy trial with a simple procedure and little formality. There will then be no occasion to set in motion the more formidable proceedings under the Penal Code, except in extensive cases of mischief by fire, timber theft, or fraud. It is, in short, desirable to have a special machine for the minor work—we do not need to set in

2. If the waste lands belong to Government (in the absence of any private rights), all the products are equally Government property, as accessories of the land (see Chapter I, page 5, *ante*). Consequently, no one can collect or remove such products without, technically at least, committing a theft. The question of the gravity of offence involved is, of course, another matter. Practically, a person does not pick your pocket unless he is a criminal by habit, whereas a man might steal some brushwood from a forest without being other than ignorant and unreflecting,—at any rate in a country as little civilised as India.

motion a steam hammer to crack a nut. All modern nations recognise the difference between small forest offences (*délit* of the French law), and crimes of a graver sort implying criminality of character in the perpetrator.

§ 6.—*Liability of forests to fire and other destructive agencies.*

Then, again, a forest is an estate which is peculiarly liable to accidents—some of these being the result of natural forces, cannot be controlled except indirectly; but one of the worst of these—*fire*—though sometimes originated by lightning, is far more often caused by the malice or carelessness of man; the red-hot stump of a cigar, the coal from a "huqa" negligently thrown down, or a camp fire left unextinguished, being sufficient in dry weather to give rise to a conflagration in which not only the growth of past years, but the hope of future generations, may be destroyed in a few hours. It is therefore necessary to make some special provisions regarding fire, and to punish not only acts of direct incendiarism, but acts of negligence which put the forest in danger. It is also reasonable to require the special assistance of the neighbours in extinguishing a forest fire.

§ 7.—*Interference with private forests in certain cases.*

Lastly, as regards the forest itself, a special law is needed to enable Government to interfere in certain cases, against the waste or total clearance, even of private forests, when they are in such a position that their removal would threaten the safety of neighbouring lands. In mountainous countries such clearance may give rise to land-slips, falls of stones and rock, erosion of ravines, and formation of torrents, while they may entail the diminution of water-supply in springs and streams at some times, and the excessive flooding of watercourses at others, whence disastrous floods in the great rivers may ultimately be caused. The preservation of belts of forest is the chief, if not the only known, preventive against such calamities. In level countries, forests may give important aid in checking the spread of malaria, in preventing land becoming marshy and

unwholesome; while in some cases they act as a protection against wind and storms, and against the spread of sands[3]. If such forests are ruthlessly destroyed, the results, direct or indirect, to a very wide extent of country, may be deplorable.

§ 8.—*Special need for interference with transit of produce.*

And there is another branch of forest law. It is not sufficient to afford protection merely within the limits of the forest itself; the produce of the forest must be followed in transit, whether by land or by water. In the first place, unless such produce can be kept to certain usual routes, and can be examined at certain points, it is obvious that the public forests may be robbed with impunity. Either entire loads of stolen timber could be got out at night, or excess quantities fraudulently obtained, be included in, and concealed under, produce lawfully purchased. Such protection is then needed, directly, in the interest of the public revenue, and indirectly, for the safety of the forest itself. The control of produce is also very much in the interest of honest owners of forest produce in transit. This is especially true in those parts of India and in British Burma where the chief means of exporting timber from forests (perhaps far away in the hills) is the floating of logs down the rivers. Timber and bamboos while in transit in this way are, as the Germans express it, "*angreifbar*"—particularly easy to be made away with.

Consequently, it is necessary not only to allow of the stoppage and examination of produce in transit, and to levy fees to cover the expense of this supervision, but it is also necessary to protect owners by registering the marks used to indicate property in timber, by undertaking the control and police of rivers used for transport

[3] It will be observed that I make no mention of the question of increasing the rainfall. Our knowledge on this interesting question is not yet sufficiently matured to make it the ground of direct legislative interference. I therefore confine myself to some of the no less important cases in which the protective effects of forest are quite beyond dispute. It is curious that writers who call in question what they call the "climatic" effects of forest, invariably appeal to the rainfall question on which we do not insist, and ignore the points on which we do rely.

of timber, and by taking under State protection all drift and unmarked timber.

§ 9.—*Special service to be vested with powers, &c.*

Again, the great variety of tasks which even this brief sketch shows to be imposed by the State management of forests, obviously necessitate a *special service* of forest officers, who constitute at once a forest police for protection and surveillance; a managing agency to handle the estates, keep their accounts, and realise their revenues; and a professional staff to direct and carry out works of utilisation, regeneration, and improvement. Such a service needs to be organised, to be vested by law with certain powers of arresting offenders, interposing to prevent offences, and demanding help in the case of fire or other danger.

These are the principal reasons, though further ones may be found in various text-books[4], which have rendered it a matter of well-

[4] See, for example, the introductory chapters of Grabner. It will not be necessary for me to allude to the *importance* of forests as making them worthy of special legislation. To understand fully this subject, we must understand also the place that forests occupy in the economy of nature, and that obviously is beyond the scope of a Manual like this. From the earliest times, however, the value of forests has been recognised, if not fully understood or accounted for. Cicero speaks of forests as "*subsidium belli, ornamentum pacis.*" Pliny calls them "*summum munus hominibus datum,*" and such like quotations from early writers might be multiplied indefinitely. I will only quote two brief passages to illustrate this subject. One is from an old English writer of the 16th century (Manwood): the other is from a modern German author (Eding). These show the ancient and modern conception of forest in its connection with law. The passage from Manwood is rather curious, as showing that at an early date not only was the "game question" appreciated, but also the more solid advantages to be derived from forests. He says:—"If a forest of the King's be carefully and diligently looked unto, kept and preserved as it ought to be, by good and profitable officers, who have the charge and care thereof committed unto them, then there doth grow unto the King by a forest especially these two benefits, that is to say: *first*, the plenty and increase of deer, as well for the provision of venison for the King's Court, as also for the princely delight and pleasure of the King to hunt for his recreation, when His Grace is wearied with the burden of cares in matters of the common weal; *secondly*, the great woods and timber trees, as well of his subjects, as of his own demesne woods being within the forests, are most especially preserved thereby, to be in readiness when the King shall have need of them, which, otherwise, would be cut down and destroyed: for the slender and negligent execution of the Forest laws hath not only been the decay and destruction of the deer almost in all

established practice in all countries where there are large natural forests, to enact either a complete Forest Code, or at any rate a series of laws and ordinances dealing with all or some of the subjects to which I have alluded.

SECTION II.—FOREST LAWS IN EUROPE AND INDIA.

§ 1.—*The laws of Europe.*

Among the best known of the European laws may be mentioned the French Forest Code[5] of 1827, the Austrian law (*Forstgesetz*) of 3rd December 1852, supplemented by the "Imperial

places within this realm in forests, but also of great wood and timber, the want whereof, as well at this present time as in time to come, shall appear in the navy of this realm.

"And furthermore, the want of the execution of the Forest laws doth breed the ignorance of them so much as it is at this day: for these laws now are not only out of use in most places, but also grown into contempt with many inhabitants in forests. I do not speak this to that end that I would have Forest laws rigorously executed upon offenders in forests, but to have them so executed that forests may be still known for forests, and the game preserved for His Majesty: for, otherwise, it were better to disafforest them altogether, and then His Majesty shall be discharged of the great fees that are yearly paid to officers of the forest out of His Majesty's Court of Exchequer."

The other passage, showing the modern aspect of the question, is brief but admirably put, and deserves to be quoted. Eding remarks in his preface:—"Forests are not only necessary in the economy of human society, but also in the economy of nature; and this necessity is so great and so real, and has such an intimate connection with the welfare of the State, that a scheme of legislation which ignored it, would inflict a grievous injury on the country at large. The injury resulting from a neglect of forests is all the greater, because it operates only gradually. The mischief done, proceeds slowly on, till, all at once, it comes to be seriously felt by everybody. Then it is too late: the restoration of the forest is either altogether impossible, or requires for its accomplishment a long period of years and an enormous and disproportionate expenditure."

[5] There is a small pocket edition of this Code, containing also the laws about reboisement of mountains, the Codes of hunting and fishing, and the Regulations of the forest service. It is uniform with the "Guide Forestier" and published at the "Bureau of the Revue des Eaux et Forêts," Paris. There is also a useful edition containing all recent alterations and orders relating to the subject, forming part of a series of "Codes Annotées" by A. Sirey, published at Paris (Cosse Marchal et Cie Place Dauphine 27.) (See also list of abbreviations at the beginning.)

Patent" of 1853, regarding the buying out of forest rights[6]; the law of Saxony described by Qvenzel;[7] and the Bavarian law of 1852[8]. A complete and rather over-elaborate forest law for Hungary was passed in 1879. There is no code of forest law in Prussia, but a number of separate regulations and ordinances. In Italy a general forest law has been passed (20th June 1877). There is also a Swiss Federal law of 1876 applicable to all the Cantons, which contains some admirable provisions[9].

§ 2.—*The laws in force in India.*

In India, the Forest law applicable[10] to Bengal, Assam, the North-Western Provinces, Oudh and the Panjáb[1], the Central Provinces and Bombay, is the Act VII of 1878. In the Panjáb, a short code of rules for hill forests, passed in 1855, still has the force of law under the Panjáb Laws Act (IV of 1872), and these rules must be read along with the subsidiary rules made under them. The Kangra rules of 1860 and the Rawalpindi rules of 1856 are the only ones that have been sanctioned. In Berár there are "forest rules" issued by the Governor General which closely resemble the Act of the rest of India. For Madras a special Act will shortly be passed. Ajmer has a special Regulation (VI of 1874) under 33 Vic., Cap. 3. Burma has a special forest law (Act XIX of 1881), which may be described generally as an improved edition of

[6] This Code is described in Grabner's work.

[7] See list of authors at the beginning, giving the abbreviated titles used throughout this Manual.

[8] This law is the basis of Dr. Roth's work.

[9] This, of course, is apart from local regulations and laws applicable to the different Cantons. The general law was passed in 1876, and may be found in the *Revue des Eaux et Forêts* for July 1876 (Vol XV, page 233).

[10] See section 1, Act VII of 1878.

[1] One of the Panjáb districts (Hazára) being a frontier country occupied by mountains, has a special Regulation under the 33 Vic., Cap. 3 (No. II of 1879 repealing the older one of 1873). This proceeds on the same principles as the Indian Act, but deals specially with the important question of protecting forests in the interest of village communities, forests which cannot be brought under the law relating to Government reserves.

In Bengal at the time I am writing (1882) the old forest Act VII of 1865, is still in force in the Soutál parganas.

the Indian Act, with some additions and alterations to suit the special conditions of the province.

I think that the general lines of Indian forest legislation are now sufficiently secured to enable me usefully to present the student with a somewhat detailed account of them. I shall take both the Indian and British Burma Acts as a basis, without, however, professing to comment on every separate section.

§ 3.—*Use made of Continental laws in this Manual.*

Throughout the work I shall illustrate my remarks by an occasional comparison with the laws I have above alluded to, partly because it is always instructive to compare one law with another; partly to show that the great principles on which forest law must always proceed, are fundamentally the same, no matter how local circumstances may require variations and additions in matters of detail. It will be, I think, a strong ground for confidence in the general wisdom and reasonableness of our own legal provisions,—even those which seem at first sight to persons unaccustomed to deal with these questions, arbitrary or too extensive—if I can show that they are supported by a *consensus* of skilled opinion in Europe[2]. But there is another use in such a comparison. There remain a large number of matters of detail which the Indian Act has not touched on; matters which must settle themselves in the course of practice, and by the decisions of the Courts when questions arise. I think that it will be found that the more developed practice of European nations will

[2] It is true that the countries of Europe exhibit a degree of civilisation so much higher than that of India that provisions which are accepted in the one may be viewed as ill adapted to the other. But this argument is least applicable where those who object to forest legislation in India most require to use it. The objection to forest law is chiefly that it is an interference with the rights of the villagers, and here the difference of civilisation does not tell. It is surprising how much alike in regard to wants of grazing, firewood, &c., the peasantry of all countries are. The Swiss, French, and Italian peasantry, after generations of forest conservancy, are as much opposed to the necessary restrictions on the exercise of rights, and often make objections to them as unreasonable, as the peasantry of an Indian province.

very often afford excellent suggestions to be adopted into our own practice, and help us in settling some of the questions that the Act does not dispose of.

§ 4.—*Objections to some of the Continental laws.*

I am well aware that all the Continental forest laws do not work equally well. The Austrian Code, I am informed, excellent as it is on paper, is not carried out to much practical effect. The Italian law, distinguished for its simplicity, is said to be ineffective in many provinces. In this latter case, however, and I have no doubt in others also, the defect is in the administration, rather than in the law. In Italy, it is the misfortune of the country, that in bygone days—days which sensible men would give worlds to recall—all, or nearly all, the State forests were alienated. The law now applies to forests belonging to communes and to public institutions, and to private forests under certain circumstances, and to a limited extent. But the absence of State forests deprives the Government of the means of training a staff of forest officers in the work of practical forest management; and the forest officers who have been taught at the Forest School, lack the experience that responsibility in regard to actual management (not mere inspection) can alone give[3].

I do not, therefore, think that these difficulties in any way depreciate the value of these laws, as means of confirming or illustrating the rules laid down in our own laws. They remain unaffected as regards their principles, and it is on account of the importance of certain principles in forest law, and to justify those principles

[3] Forests are also under the law, managed (owing to their being partly communal and partly private estates) under the direction of committees (*comitate forestale*) of whom the Government forest officer is only one member (a public engineer, elected delegates of the municipalities, &c., being the others, with the préfet as president). Unless such committees are very enlightened, and really let the forest officer guide all professional points while helping him in other matters, it is impossible but that local and personal interests and prejudices will intervene to the destruction of all real control. A forest cannot be managed, any more than a regiment in the army, by a debating club.

by showing that they are recognised in countries where the subject of forest management has long received attention, that I chiefly employ them.

§ 5.—*The English law on forest matters.*

The English law and its text-books are less useful. This is not to be wondered at, since England is not a forest country. There are no large estates maintained by the Government or by public institutions for the purposes for which forests are maintained in the continent of Europe and in India.

The ancient laws relating directly to the preservation of the deer have now only a historical interest, and the only modern legislation that can be called forest law, is the law relating to the New Forest, which is not only purely local, but is in itself entirely unsatisfactory.

The Enclosure Acts touch upon one branch of the law of forests—the compensation of rights of user which are interfered with by the 'enclosure' of certain lands; but here, again, the Enclosure Acts do not contemplate, otherwise than casually, the creation of plantations, still less of forest estates *for the public benefit*, and therefore the treatment of rights of user is provided for from a totally different point of view and with a totally different object.

The fact is that the idea of forest estates managed for the public benefit, has never taken any hold in England, where the configuration of the soil and the climate do not (speaking generally) make forests a necessity, where the abundance of coal has superseded firewood, and where the import of foreign timber has hitherto been cheap and easy. Circumstances, therefore, have not favoured the growth of a body of forest jurisprudence.

The text-books dealing with forest rights are few. The most recent work is "Williams on Rights of Common." These lectures are chiefly taken up with the peculiar features which distinguish the acquisition and exercise of rights of common under the Common Law and certain statutes. The reference made to forests is cursory, and then solely to the old laws, not to any modern view of the subject.

The peculiar rules based on old case law and on the historical technicalities of English land tenures, which are learnedly illustrated by Mr. Williams, present few points of contact with the growth and character of forest rights in India or elsewhere[4].

It is not surprising, therefore, that it is only occasionally that a particular point decided, or a particular principle admitted in the English text-books, can be quoted to any purpose.

I have dwelt at some length on this subject, because it might strike some readers as strange that I should so often refer to foreign books, and so seldom to English ones, which would be more accessible to students. The reason is now, I hope, clear. If more is wanted, I would ask the reader to look through my chapter on forest rights and their settlement, so as to see the sort of questions on which we seek for information; if then he will read "Williams on Rights of Common," he will not then fail to understand how different are the objects aimed at it by either.

SECTION III.—TO WHAT LANDS DOES THE SPECIAL LAW OF FOREST APPLY?

§ 1.—*Definition of forests.*

The question with which I have headed this section may strike the reader, at first blush, as superfluous. "Forests," he will say, "are of course the proper subjects of forest law." But in India it is not every piece of land, which could be called "forest" in an ordinary and popular sense, that needs to be brought under forest law. It was therefore natural, on making the first essay in forest legislation, to try and frame a definition that would cover all the lands likely to be wanted for management as forests.

[4] If we were to attempt to apply in our Indian practice the principles of pleading in cases of claims to rights of common, laid down by Mr. Joshua Williams, it is probable that about two-thirds of all the "Forest Rights," which we are settling and regulating under the Forest Act, would be held inadmissible at law. What would become of Indian forest rights, if they could not be claimed by custom (Williams, 194), nor by fluctuating bodies as "the inhabitants of a place" (*id.*, p. 13), nor if indefinite (*id.*, p. 191), nor if unreasonable (*id.*, p. 191)? The English law would not step in to define or regulate such rights: it would simply refuse to allow them to be well founded.

This was exactly what was thought when the first Forest Act was drawn up in 1865. The old Government Forest Act (VII of 1865) actually contained a definition :—

"Government forest" was defined to be "land covered with trees, brushwood or jungle[5] declared to be Government forest under the Act." But it is obvious that such a definition is imperfect and unsatisfactory[6].

Nor do any of the continental laws help us with definitions which we might adopt or modify, because their way of dealing with the matter does not require a definition of forests, as will presently become clear[7].

[5] It will be observed that the term "jungle" is itself obscure. If it is difficult to say what is "forest," still more so is it difficult to say what is "jungle." Speaking generally, I should say that jungle included all waste that was not merely grass land, but perhaps the tall grass savannahs of the Tarai, Burma, &c., would be called "jangal." "Jangal" also, I am told, means all natural growth on land before it is brought under cultivation.

[6] Indeed, it is mischievous: since if a forest is land covered with trees, &c., *and* declared under the Act, it would follow that a tract of land not so covered, even if it were declared, would not be legally a forest, or subject to the law. It may happen that land perfectly bare, or covered only with grass, is taken up for a large plantation which can only be gradually completed; nevertheless, it would be important to have the whole area under forest law from the beginning.

[7] The fact is that, as a matter of abstract possibility, no definition of forest, at any rate suitable for legal purposes, has ever been framed. Several books give a *description*, which is not a definition; such as that "a forest is a whole consisting of soil, climate and certain growths, &c." (see Frochot: Traité Générale, p. 99). In the article (Forêts) in the *Repertoire de Jurisprudence Général*) of Dalloz (Vol. 25 Paris, 1849), forests are defined as "lands whose principal products consist of timber trees or firewood." "Lands" (it is added) "which, though bearing trees, give, as their chief product, fruits hanging from the branches, are (not forests but) orchards." It is obvious how very insufficient this would be, at any rate for legal purposes, in India.

In early historical times a forest was looked upon as a place where beasts of the chase were protected. The writer last quoted says that some have tried to derive the word forest (*foresta*) from the words "*ubi fera stat*" or "*ferarum statio*," the place of wild beasts.

Manwood (3rd edition, 1665 A.D.) gives a similar account of forests, and goes on to say that forest law is for the protection of the game. This was indeed the purpose of all *early* forest laws. (See *Die Staats Forstwirthschaftslehre*—von Berg, Leipzig, 1850, pp. 1—3). See also a specimen of forest law of the 11th century which I translated in the "Indian Forester" (Vol. IV, p. 161).

Ultimately, however, it was perceived that even if we had a definition, it would not help us really to apply our law, under the conditions in which interests and rights in lands actually exist in India. This will become clear on a little further reflection.

Even if we knew that beyond question such and such lands were *forests*, it is clear that the law would not be applied to every kind of forest property: we should still require to know what was the precise interest or right by which each "forest" was held, before we could say whether it ought to be under the law or not. And this we cannot, without a special enquiry and adjustment of claims, determine. No doubt some "forest" would be unquestionably Government property, and of course could be subjected to the

The passage from Manwood is as follows:—

"A forest is a certain territory of woody grounds and fruitful pastures, priviledged for wild beasts and fowls of forest, chase and warren, to rest and abide in the safe protection of the king, for his princely delight and pleasure; which territory of ground so priviledged is meeted [meered] and bounded with unremoveable marks, meets [meeres] and boundaries either known by matter of record, or else by prescription; and also replenished with wild beasts of venery or chase, and with great coverts of vert for the succour of the said wild beasts to have their abode in. For the preservation and continuance of which said place, together with the vert and venison, there are certain particular laws, priviledges and officers belonging to the same meet for that purpose, that are only proper unto a forest, and not to any other place" (p. 41). ("Vert" means the "green" grass, trees and bushes of the forest.) The edition of 1665 uses the term "meet" and "meeted." In the quotation in Williams probably from the earlier edition, it is "meere" and "meered;" both terms refer to boundary marks.

But it seems that at an early date the value of forests for something besides game became evident. The importance of wood to the public, and to the navy above all things, became recognised, as well as the value of those rights of pasture, &c., which the people had in the forests. As long as the idea of game was uppermost, lands were "afforested," and rights ruthlessly suppressed for no other reason than they interfered with the preserves. Then came a reform, in which the rights were again restored. In England a "charta de foresta," passed in the 9th year of the reign of Henry III, promised that all estates afforested by Henry II should be "viewed" and rights restored; and very soon the law of rights became understood. "In England," says Cooke (p. 5), "rights of common were known to our oldest text-writers nearly as they are known to us at this day. Bracton, one of the earliest and most venerated of these, wrote upon the subject in the 13th century." In France we find an ordinance of Philip the Bold in A.D. 1280 regulating forest rights, and in Germany the term "forest" acquired its modern signification, or something like it, as far back as the days of Charlemagne (Roth, p. 46).

law: no doubt also other "forest" would be as clearly private property, and therefore not (except in particular cases) to be interfered with; but between these two well defined extremes, there would be found estates represented by considerable areas of waste and "jungle," which are in a manner, or to a certain extent, the property of Government, but on which so many conflicting interests have been allowed to grow up, that, *in statu quo*, it is very difficult to say whether they should be classed as Government forest, as communal forest, as private forest, or what.

We have therefore given up the attempt to define forest because it is impracticable. The real task of Indian forest law is to legalise, and of the Administration to carry into practice, a procedure by which the rights of the State and of other persons, may be sifted, separated, and adequately provided for, so that a series of forest estates, to which the forest law shall apply, may be *constituted*, or eliminated out of the somewhat chaotic conditions that actually subsist.

Some of these lands will be clearly Government or State forests; others will probably resolve themselves into forests owned by villages or communities, but subject to the law—managed or supervised by the State, and incapable of being partitioned and broken up; others may remain joint properties, managed by the State, the due share of the profits being paid over to the other sharers.

All estates developed under the procedure prescribed by the Act will then be naturally and unmistakeably subject to its provisions, without any need of enquiring precisely what is the definition of a "forest."

§ 2.—*Difference between Indian and European laws.*

Here we are introduced at once to a difference between Indian and European law, which will not fail to strike any one who has, for example, read the French Forest Code.

In the countries where the whole area of each province is occupied and owned, where every acre has been the object of careful

cadastral survey, and where all landed property has, according to the different laws in force, been classified and registered, there cannot be a moment's doubt about the nature or situation of a forest or any other estate[8]. There is no possibility of doubting to what class any given land belongs. The whole area of every district is as definitely classified as the white and black squares of a chess-board. There is not an acre but it can at once be said, this is arable land, the property of so and so; this is the forest of village A or of hospital B; this is a royal moor, and so on. It has long been known and registered as such. The forest law can then at once start by classifying the forests according to the proprietary right over them. No definition of "forests" is then necessary, and this is why none appears in any of the laws, as already stated.

Thus the French Code opens in the following manner:—

"Art. I.—Subject to the forest *régime*, and to be managed conformably to the provisions of this Code, are:—

(1) State forests[9].

(2) Forests belonging to 'communes' or sections of communes.

(3) Forests belonging to public institutions (schools, hospitals, &c.)

(4) Forests in which the State, or a commune, or a public institution, has undivided rights along with private individuals (*forêts indivis*).

[8] The Italian forest law offers to some extent an exception; but this is partly owing to the fact that there are hardly any State forests, partly also to the fact that the law aims at securing not only management of forests so as to secure a supply of timber of good dimensions, but also the protection of the country from a "climatic" point of view. The law applies therefore to *all* forests in *mountain ranges* within a certain zone. Here, of course, high forest or mere bush may both have their importance; consequently, the law does not speak of forests as specific "properties," as estates of one kind or another, but as *lands* "clothed with woody-stemmed vegetation."—(Art I, Law of 20th June 1877.)

[9] These are in the text of the Code classified into three kinds, depending on the early history of State forests. This distinction is omitted as having no interest for the Indian student.

"Art. II.—Private forest owners may exercise all rights resulting from their proprietary title, subject only to such restrictions as are specifically provided in this Code."

This clearly implies that all these kinds of forest are in existence and are well-known properties. The utmost that is required is the occasional definition of a boundary, or the regulation or buying out altogether (as the case may be) of rights which burden any particular forest.

If the law desires to go further, or deal with some special case, such as to plant sandy dunes, or restore the denuded areas in mountain districts, such areas are provided for by special law, or are specially declared subject to the forest law.

In the instance given (the French law), the State undertakes the management of communal forests as well as its own.

In other countries the law starts with a similar well-known and existing classification of forest estates, though all of them may not be subject to the same State control. Thus, in the Bavarian law, forests are classified as (1) State forests (*Staats Waldungen*), and (2) forests under State supervision (*Curatel Waldungen*). The latter class comprises forests belonging to communities (*Gemeinde Waldungen*), to corporations (*Körperschafts Waldungen*), and to public institutions (*Stiftungs Waldungen*).

Such a method of starting would be quite impossible in India. Our forests have not yet been separately crystallised out of the elementary mass of jungle lands.

We have, as I said, still to create or constitute the different forest properties, or, in other words, to put things in train, so that the different classes of forest may grow up or develop themselves.

The answer, then, to the question at the head of this section may so far be given that it may be said:—the forest law only applies to those estates which are constituted, or become, forest estates of one kind or another, under its provisions.

But it still remains further to be explained what lands are available to be constituted forest estates.

SECTION IV.—THE CONSTITUTION OF FORESTS IN INDIA.

§ 1.—*The usual condition of waste land.*

The student will remember that we examined the question of the waste lands, and found that, in the absence of recognised private rights of ownership, however originating, the Government is, by ancient law, the general owner of all unoccupied or waste land[10]. Some portion of this has been given by public authority up to and included in the limits of towns, cantonments, and stations; some has been devoted to public roads and camping grounds; some has been leased or sold for cultivation: but after making allowance for all these dispositions of the "waste," there still remain (especially in the various hill ranges) vast tracts of "jungle" available to be made into forests.

But, unfortunately, the progress of events has not always left the *status* of this unoccupied waste perfectly clear. In some cases it is doubtful whether it is or is not attached (in some sense or other) to a neighbouring property, and so becomes subject to the same right. In other cases, rights of user may have been allowed to grow up, or may have been recognised by settlement and other orders; that is to say, persons may have been suffered to graze cattle, cut wood, and take other produce from them for so long that they are now regarded as having a *right* to these enjoyments, though Government remains the owner of the land itself. Or matters may have gone still further. Government may have given up (expressly or by inference) the *land itself* to certain persons or villages, and retained only certain rights—certain relics or fragments of its original plenary right of property.

Consequently, the *extent* of the Government right is not the same in all waste lands: it may vary from a simple unrestricted property, to a property so burdened with rights of other people that Government has only a very slender interest left.

[10] See Part I, Chapter III, Sec., III, page 55, *ante*.

§ 2.—*This condition accounted for.*

It is not difficult to account for such a state of things in India. At first the population was very scanty, and in most places the land covered with natural jungle was far in excess of the requirements of the population. Speaking generally (for of course there were districts exceptionally situated), the occupied and cultivated "villages" formed oases in the great expanse of waste land. The object of the ruling power was then not to protect the waste as useful forest, but to get cultivation to extend as fast as possible and to increase its land-revenue. Consequently, it never cared to assert any special right over the waste as forest or as anything else: it ignored it altogether, and suffered the neighbouring villagers to wander over it at pleasure, to graze their flocks, cut trees (and perhaps sell them if they were near enough to a practicable line of export), and burn the forest to produce fresh grass, or for temporary cultivation. This state of things continued down to our own time, in all those provinces where the waste was, relatively to the cultivation, extensive.

§ 3.—*Right of the State not lost.*

But it would be the greatest mistake to suppose that, because the ruling power did not care to assert its general proprietary right in the waste, that therefore it had lost it or abandoned it. There never was a time when the sovereign could not at any moment make a *grant* of the waste, to be brought under cultivation; showing that its right, though not asserted at all times, could at any moment be revived[1]. There never was a time when the Government could not issue an edict "reserving" certain valuable trees—teak, sandal, blackwood, and others—as royal trees; nor any time when the chieftain of the province would have hesitated to enclose off a large area of the waste as a hunting preserve.

[1] "The right arising from the State's eminent domain is not extinguished by its mere non-exercise, and its exercise was not called for till some public injury or inconvenience arose" (*per* WEST, J., in the Kanara case, p. 739).

There may have been cases where the whole waste was, as in the permanently settled districts of Bengal and Madras, deliberately given up to the zamíndárs; there may be others where, at a land revenue settlement, it was thought right to give up the waste to the villages within whose nominal boundaries it lay, as in the North-West Provinces. But in all such cases the abandonment by the Government of its right in the waste is capable of distinct proof; and vague statements that "Government has not asserted a claim to the waste for generations," and such like (which are sometimes put forth as objections to the introduction of forest law), are wholly inadmissible.

§ 4.—*Rights of user adverse to the State.*

But while in most cases (except where, as above indicated, there is distinct proof to the contrary) the ultimate right to the waste remains to Government, it is equally true that the long-continued user of its surface products by the neighbouring villages or by individuals, cannot in fairness be ignored or rudely thrust aside.

Whether or no these long-continued usages have given rise technically and in the strict legal sense to a *right*[2], still, in practice, they must be provided for; and it is impossible to constitute a forest estate without considering the public welfare, and judging whether, considering the claims of the neighbours, the forest can be made into a Government forest estate, or had better be given up to the village, or should be regarded as the joint property of the State and the village.

§ 5.—*Practical result of the different rights.*

The result of such an equitable recognition of rights of user, taken together with the original right of the State in the waste, will practically (as we know by experience) be found to leave all the waste lands (which have not been expressly alienated) in one or other of the following predicaments:—

(1) The lands are the absolute property of Government.

[2] See some further remarks on this subject in Chapter V, Section 1, on the subject of Forest Rights.

(2) The lands are the property of Government, but are burdened with rights of user.

(3) The Government has parted with the proprietary right, but still retains the right of management, or the right to the trees, or the right to close for improvement, or the right to levy fees for use of the products, or some right of the kind other than proprietary right.

The Indian Forest Act therefore in section 3 takes up the whole mass of lands which are waste and unoccupied, and which are, in some general sense, at the disposal of Government—and the terms of section 3 will be found exactly to cover the three cases put—and subjects them, *not* to any arbitrary *régime*, as they stand[3], but to an initial process of settlement, enquiry, and adjustment, the object of which is to establish them ultimately in one or other of the classes into which they should naturally and logically fall when once the different rights are ascertained and separated.

§ 6.—*State or "reserved" forests the most important to the public at large.*

The class of forest estate, the constitution of which is naturally the first object, is that which can be kept permanently and managed by *the State* under complete rules, for the benefit of the public.

The separation therefore of the rights of the State from those of private persons is therefore primarily aimed at by the Forest Act (Chapter II). We know from experience that, by proceeding in

[3] Here I must point out the absurdity of the objection which I have seen raised to section 3, that it amounts to "confiscation," that it puts it into the hands of Government to seize upon estates in which it has only such a slender right as to be entitled to "part of the produce," and so forth. The section does nothing of the kind; it does not alter existing rights by one hair's breadth. It simply gives power to Government to initiate a fair and reasonable process of enquiry and settlement whereby all rights will be fully recognised and provided for. If we were to try and start with something less than the whole mass of unoccupied lands, it would inevitably be found, in practice, that a more restricted definition would prevent our dealing with lands which might properly be dealt with, and yet would include lands that ought to be let alone.

this way we, first of all, place in a safe position all such forests as can be managed more or less completely for the benefit of the State at large.

In some cases such forests will be found to be entirely free from all adverse rights: but in a large number of cases there will be certain rights of user, or claims to plots of land within the forest, which will require settlement, but which being arranged for, will leave the forest as a whole, fairly profitable to the Government.

Such estates will form the backbone of the forest administration, and will be the permanent public forest estates, on which the country mainly depends for those benefits, direct and indirect, which forests afford.

These estates are called in the Act "reserved forests[4]," and the process prescribed for their constitution and for their management when constituted, is the standard or regular forest *régime* which must be applied as far as practicable to all forests which it is intended permanently to preserve, and which the State has a right to control for the public benefit.

§ 7.—*Lands which can be only managed as forest to a limited extent.*

If we succeed in establishing this great class of Government reserved forests, whether burdened with, or free from, rights of user, the rest of the lands will without difficulty be dealt with, and the interests of the persons entitled be secured. For it is obvious, if the conditions necessary to constitute a "reserved forest" are examined, that it will not be *all* the lands included in the necessarily wide terms of section 3, that can actually be made into a "reserved forest" *for the benefit of the State.* Nevertheless such lands may still be of importance, and their conservation be desirable.

[4] The phrase is not a happy one, but it is consecrated by long familiar use in India. It means that, whereas most tracts of forest or "jungle" are gradually brought under the plough, or leased under the "waste land rules," *these* forests are "reserved" from alienation and from being cleared or devoted to purposes other than the production of forest produce.

In some cases it will be best to make over these lands as village forests for the benefit of the villages whose rights in them are already very extensive.

The settlement of rights would then only be of rights of other individuals or communities (adverse to the villages to whom the forest belongs), or claims of individuals which are inconsistent with the general enjoyment of the forest[5].

In other cases the Government will have no right to anything, but to the trees, or to some fees or dues, and yet the conservation of the forest may be of great importance. Here section 79 also helps; since not only does the section apply to jointly owned forests (properly so called), but also to forests in which the produce may be shared between Government and others. In such cases it would be easy to act under section 79, clause (*a*), and undertake the management, accounting to the villagers for their interest (and allowing them a proper use of the forest, which is what they would be more anxious about).

As I said, however, the great bulk of waste lands mentioned in section 3, and brought under the operation of the law, with a view to their settlement, will be found to be lands in which there is no doubt about the proprietary right in Government: only the rights of user may be more or less extensive. So that the Act looks primarily to the constitution of reserved forests for the benefit of the State. In future, the constitution of village forests under a similar procedure will probably become of almost equal importance, and

[5] This, I think, would, in practice, be what a Settlement Officer would do, when he was applying the procedure of Chapter II to the settlement of a tract which was not intended to be a forest for the benefit of Government, but for the benefit of a village (under State control). The Act, considering that practically State reserved forests will be the largest and most usual class, has drawn up the provisions for the settlement of claims to land (section 10), and to rights (sections 11-14) on the basis of their being *claims adverse to Government.* The difficulty might be avoided, when the Act is revised, by wording Chapter II so as to suit all classes of forests that were put under a normal or regular management, and constituted as permanent forest estates: the claims then would all be settled from the point of view of the particular class to which the forest was intended to belong, not only, as at present, in the interest of Government.

this the Act contemplates by Chapter III. This chapter is not very happily worded, but will easily be amended when it becomes necessary. The cases which cannot be settled directly under Chapter II or III—where Government is actually joint owner with a village or an individual, or where the Government has lost its rights in the soil—are occasional only[6].

In stating this, I do not mean to undervalue the importance of exceptional cases. In districts where the rights in the waste are in a doubtful or confused state, it may be, nevertheless, of great importance that forests under State control (no matter whose property they are) should be properly constituted. The very existence of strong claims to user, and large indefinite concessions at settlement, which have rendered it impossible to constitute "reserved" forests, show that the forest is very much wanted as forest, and therefore that it ought to be settled and permanently secured for the benefit of the interested parties; and this, we know, will not be done without due regulation and State management or supervision.

SECTION V.—IN WHAT DOES THE "CONSTITUTION" OF FOREST ESTATES CONSIST?

In order that any forest which the State is directly concerned with, may be permanently maintained, and that it may be so managed as continuously to yield the products (of whatever kind) which it is most in the interest of the proprietor[7] that it should yield, certain things are necessary and must be provided for by law—

(1) The estate must be *demarcated;* that is, the limits of the area within which the forest law will have effect, must be determined and indicated on the ground.

(2) The rights and interests in or over the estate (or any part

[6] See further Chapter VII, on undivided forests.

[7] Whoever it is—the Government, the villager, or the public institution.

of it) of persons other than the State (or the village or community, as the case may be) must be ascertained, settled, and equitably provided for in a manner to be determined by law (and described hereafter)[8]. This is necessary not only in the interest of the forest, but also in that of the right-holders.

(3) Provision must be made that *no new rights* which are adverse to or burden the estate, can in future grow up or be acquired (except in State forests by express and exceptional grant of the State itself). The existence of such rights is, as we have seen, always a source of perplexity; it is eminently desirable, then, that having once settled those that exist, and ascertained that at a certain date certain rights were equitably and lawfully in existence, no new rights should spring up or be gradually ripening by prescription.

(4) That all such existing rights as are not provided for in a legal manner outside the forest, and are not bought out and cleared off the estate, and consequently remain to be exercised on the estate, should be *regulated* wherever necessary, so that they may be fairly enjoyed without injuring the forest, and making its maintenance and improvement impossible.

It will be found that the whole process of constituting a reserved forest, described in Chapter II of the Act, resolves itself into a series of steps tending to attain all these objects.

And every forest which is wanted as a permanent estate for forest purposes must, to a greater or less extent, have all of these steps taken in its behalf. Consequently, wherever the Act speaks of the State taking under management village forests, or forests that belong jointly to private persons and the State, it always

[8] In some countries even *private* forest-owners are also allowed to insist on the settlement of rights of user in those forests adverse to their management. In India we are not so far advanced as to require to enter on the subject.

refers to this standard,—the procedure under Chapter II to be applied as far as possible.

The four objects I have enumerated may be summed up in two words—*demarcation* and *settlement of rights.*

SECTION VI.—OF THE PROTECTION OF TREES AND NATURAL PRODUCE ON LANDS NOT BEING FORESTS.

§ 1.—*Chapter IV of the Indian Act.*

The student may have been surprised at my saying that there can be no permanent forest estate without *demarcation* and *settlement of rights,* because in the Indian Act, as it now stands, there is a chapter (Chapter IV) which (by its title at any rate) seems to indicate that there may be another kind of forest called "protected forest," which is not necessarily demarcated, and in which no *settlement* of rights of any kind is required or even allowed.

In reality the title is a misnomer; and the object of the law is by no means to create a further class of forest estates, but merely to extend a certain protection to forest land, which for various reasons it may be undesirable as yet to constitute a permanent forest estate. The Act will probably be amended in time, so as to prevent any such misapprehension; meanwhile it will be observed that the Burma Act contains no such chapter, but that there the matter is properly dealt with. I will endeavour to make clear what the use of a chapter of this kind really is.

§ 2.—*Its real object.*

In the first place, it is peculiar to India. In Europe, where every acre of land has long since been possessed and has a definite value, all the estates that are permanently valuable as woods or forests, are perfectly well known; there is no question about them. But in India we have still in some provinces large areas of jungle. In some there are extensive ranges of hills with moderate

slopes, and even level plains, occupied at present by dense growth of bamboos or other vegetation, but which are quite capable of being brought under agricultural cultivation. It may be impossible to say at present, to what extent these tracts should be kept as forests or given up. Cultivation must extend, and its interests are not to be forgotten. Events must be given time to develop themselves. Here, then, we do not wish all at once[9] to bind ourselves by constituting permanent forest estates, or to undertake the labour of survey, demarcation, and settlement. All we want to do is to enforce some general rules, *which do not really interfere* with any reasonable enjoyment of the forest; but which prevent any wanton destruction of valuable trees, until it is determined whether forests shall be constituted, or whether prohibitions shall be withdrawn and the land given up to the plough.

Applied in this way, the provisions of Chapter IV of the Indian Act are useful enough; but it should be always borne in mind that "protected forests" are not any real class of *forest estates* at all. It is true that certain local limits are assigned to such forests, because it is not possible to prohibit cutting trees, or the issue of licenses to clear or cultivate, except with reference to defined areas of country; and there is nothing to prevent boundary pillars or marks being erected. But that is not enough to fulfil the idea

[9] Or it may be that the tract has no immediate value, but its future cannot be foreseen. Panjáb officers will remember the case of these vast areas of "rakh" land on the borders of the Jhang and Gujranwála districts. At present, these have no value except as grazing grounds: the fuel they might yield is not wanted by any one and cannot be exported. All, therefore, that can be required is to put in force some very general rules to protect the growth from destruction, till we know, in the course of years, whether a canal or railway will come and change the aspect of affairs, and whether these wastes will then be most wisely given up to cultivation, or part of them made into forests properly so called. The Province of Assam also affords a good example of the use of protected forest. Here an area is already reserved forest, and more is being demarcated, but a larger area still has been placed under "protection." Even then there is still a large area of forest country with which, at present, it is not designed to interfere in any way, except to take a certain revenue from its products. Such residue is still called (for want of a better name) "unreserved forest."

of a forest estate: the features which prove this to be so must never be lost sight of. In a protected area—

(*a*) no settlement or regulation of rights of any kind is allowed[10];

(*b*) no rule or prohibition can be enforced, or has any effect against a right. Such rules, therefore, are only useful in forests where, practically, there are no rights. If there are any claims to rights, forest protection would always fail, because a Criminal Court, though, no doubt, bound to enquire into the existence of the alleged right, could not be expected to proceed, if there was any real doubt in the matter; since it would have no means whatever of deciding the issue whether the right did or did not exist.

§ 3.—*The possible misuse of the chapter.*

The reason why I have dwelt in this detail on the uses of Chapter IV is, that there is considerable danger of the misapplication of its provisions. People are apt, even at the present day, to imagine that if only forests are left very much alone, and everybody is left to do as he pleases (provided he abstains from very gross acts of waste and actual clearance of the ground), the forest will *continue* to produce all that is wanted. To make a forest a "reserve" is looked upon as something in the nature of a luxury. It is all very well, they think, to allow a limited area of valuable forest to be

[10] The Act, for reasons which I cannot profess to explain, speaks of an enquiry and record, but no *settlement*. The only conceivable object of such a record is to enable Government *primâ facie* to understand whether there is likely to be much popular opposition to the "protection" or not. But if there should be a great many rights of user, it would prove conclusively that the forest was much wanted by the people, and *therefore* that it ought to be settled and reserved. The record of rights, it will be observed, when made, is entirely without authority as evidence of anything. The officer recording has no power to hear objections or to reject the most extravagant claims. Any number of rights may also exist which the record has not included. No regulation of rights (however destructive they may be) is permitted. It is then obvious that only such lands can be put under this Chapter as are not subject to serious demands for grazing and wood, or are such that their deterioration as forests is not believed to be of much consequence.

"reserved" for the benefit of the Government and its revenue, but the bulk of the forest must be left unrestricted to supply the wants of the people, and should not be interfered with beyond enforcing such general rules as are contained in Chapter IV. It cannot be too clearly stated that such a view is, without the smallest qualification, erroneous. The provisions regarding protected forest are *in no way sufficient to secure a permanent still less an improving forest production*, nor are they designed to effect such an object. They only serve to prevent the rapid deterioration of the growth in places where the conditions are as yet undeveloped, and permanent forests cannot yet be decided on.

Unfortunately, also, there is another circumstance which may lead to the idea that "protected" forest is a permanent class or kind of forest. There are some places long subject to imperfect arrangements for forest management, where the village lands are very much mixed up with the lands which belong to Government, and the interests of grazing and wood-cutting are undefined and in conflict with what may be claimed as the rights of the State. The temptation, then, is great, to avoid the difficulty of a thorough disentanglement, and a settlement, once for all, of these knotty points under Chapter II of the Act. A plan of conservancy under Chapter IV is thought much easier, and rules are promulgated. In the end, as all experience shows, this can only result either in the rules being a dead letter, and the forest steadily disappearing, or else in an open rupture between the forest officers and the claimants to undefined rights. No doubt the task of forest settlement will be laborious and lengthy; but if the estate is really wanted as a forest on grounds of the general welfare, the difficulty *must* be faced; the more complicated the question of rights, the more essential is its solution before any real improvement can begin. To issue a code of rules which, like those for protected forests, *has no effect directly a question of right* (which there is no means of determining) *is started*, is simply to offer a pretentious and wholly unreal remedy.

I do not deny that, in the Panjáb for example, the rights of people over the forest have in some localities been so exaggerated,

by the mistaken action of former settlement officers, that the question of placing the forest on a permanent footing under State management becomes a very difficult one. Then, as an *exceptional* measure, we may be compelled to *adopt anything*—Chapter IV, or the old Panjáb Rules of 1855 or whatever it is—that will save the woodland from absolute ruin. But that is quite a different thing from making a general use of Chapter IV as sufficient for the bulk of forest lands generally, and regarding forests under Chapter II as a sort of luxury. In the long run it will be found true, as at first stated, that in order to constitute on a permanent basis any forest estate, the estate must (1) be clearly demarcated, and (2) the rights must be subjected to a process which our law calls "settlement;" and no new rights must be suffered to grow up or be acquired. And this is equally true whether the forest happens to be free of rights, or is much burdened with rights of the neighbouring population.

CHAPTER V.

THE LIMITATIONS TO WHICH RIGHTS OF USER ARE SUBJECT.

SECTION I.—THE PRINCIPLE THAT THE RIGHTS, NOT BEING RIGHTS OF OWNERSHIP, MUST BE EXERCISED WITHIN LIMITS, AND MAY BE REGULATED ACCORDINGLY.

§ 1.—*The principle stated.*

I HAVE said that the great bulk of our forests are constituted on lands in which the ownership vests in Government, but there are rights of user (servitudes) existing on it in favour of villages and individuals.

It is of the first importance, therefore, to understand the true nature of those rights of user, and how they may be dealt with, so as to secure their continued enjoyment without imperilling the maintenance of the forest which supports them.

This principle it is of great importance to understand clearly; misapprehension on the subject has led to much difficulty and a great deal of useless discussion in the matter of forest legislation.

The principle asserts, in effect, that all rights are in their very nature subject to a reasonable limitation and regulation in their exercise, without giving the right-holder any claim to compensation on that account.

This regulation must, of course, be within certain limits, so as not to destroy the right: in other words, the limitation must go no further than is necessary to enable the forest to be managed and worked in a rational manner. What is meant by a 'rational manner,' will be enquired into afterwards. Here I am concerned only with the principle itself.

I shall establish this, *first*, by a consideration of the nature of a right or servitude; *secondly*, by the authority of modern European

law and by the opinions of authors of repute; *thirdly*, I shall add some considerations derived from the history of the growth of forest rights in India, which will show that such a principle is here, more than ever reasonable and fair.

This last will be important, although it will to some extent repeat what I have said in another place. But the argument is necessary, because it meets the objection that principles established from European authorities, do not apply to India.

§ 2.—*The nature of a right of user.*

We have already learned that a forest right or servitude, whether held personally, or as "appendant to" (for the beneficial enjoyment of) some house or land, is a right existing in favour of one person over the property of another[1]. It in no sense constitutes a share in the property itself, or is synonymous with co-ownership in the property. It follows then, almost naturally, that rights cannot go to such an extent as to swallow up the property—to render it, even gradually, useless and valueless to the owner.

A certain obligation seems to lie on both sides. I must not use my property in such a way as to prevent your having a just and due enjoyment of your right: you cannot exercise your right in such a way as either to destroy my property or make it useless to me. This is perfectly true in the case of a right existing over a private forest or any other kind of private property, and it acquires additional cogency when the property is owned by Government, *i.e.*, when it exists for the public benefit; when it brings in revenue to the treasury, sends useful products to the market, and furnishes public works with needful material; while at the same time (in the case of forests) the property has such a place in the economy of nature, that its preservation is absolutely indispensable to the country at large.

Nor is such a principle really to the detriment of the right-holder in the long run; especially so when, not an individual right,

[1] I may again recall the definition of Act XV, 1877.

but a body of rights representing, perhaps, the requirements of many villages is in question.

The limitation of the right is, after all, a matter of economy and moderation; and the exercise of such prudence may—indeed must—tend to perpetuate the enjoyment of the right itself.

If all practices of grazing, lopping and the like, which form the subject of forest rights, go on without any restraint in a forest, unless the forest is very large in proportion to the demands on it, it is certain that the supply of material will gradually fall off; the ill-used trees will die, the soil will dry up, till there are no more boughs to cut and no more grass for the cattle to eat. Restriction of the rights then tends to maintain the estate, which, after all, is necessary for the very continuous existence of the right itself.

True it is that wasteful exercise of rights does not, in one man's life, ruin a forest estate; but it does in the course of years; and a forest administration is, of all others, the most bound to look to the future, and to take care that the present generation of inhabitants does not imperil the safety of future generations by attacking the capital, where they have only a right to use the yearly income[2].

§ 3.—*Consensus of authority on the subject: the Roman law.*

But, secondly, let me proceed to show that this principle of the inherent limitability of rights of user has a complete *consensus* of laws and authorities from the earliest times to the present day in its favour.

[2] Yet we not unfrequently have complaints made (in general terms and irrespective of precisely ascertained facts) of the cruelty of shutting up forests or putting them under restrictions, and the desirableness of leaving the forest to "free and unfettered enjoyment" of the people; although it is certain that, in the course of years,—more or less according to the moistness of the climate and rapidity of vegetation—these forests will degenerate, first into scrub, and ultimately into barren waste. Then the right-holders will be deprived of the very convenience it was desired to secure to them. Instances might be quoted where apparently barren and useless hill tracts have been kept under proper management, each portion being allowed rest in its turn, and so forth; and, after a few years only, have been the means of furnishing a reserve of grass, which has proved of the utmost value and saved the lives of hundreds of cattle in times of drought and famine.

To begin with the Roman law, which has largely affected succeeding systems.

The Roman lawyers spoke of the most extensive right of enjoyment of *another* man's property, which could be had consistently with the property itself still remaining to the owner, as the *usufructus*. The grantee of such a right could take the whole of the produce and do absolutely what he liked with it.

But even this extensive right had always so to be exercised as not to destroy the property itself. It had to be exercised *salvâ re substantiâ*[3]—the estate itself being untouched—and in the manner in which a good head of a family would enjoy the produce of an estate which was his own.

If this is true of the holders of such a right that the entire use and enjoyment of property was in the right-holder's hands, how much more must a limitation be valid in the case of a man who has a right to only a part of the products (to grazing, wood or such like); *à fortiori, he* must not injure the estate itself, or prevent its reasonable development and improvement.

Rights in a forest are always, if we look to their origin, rights of user. The whole, or nearly the whole, yield of the forest may be

[3] See Inst. Justinian, Lib. II, Tit. IV, 1; and Digest, vii, 9, 1.

I am aware that the phrase *salvâ rerum substantiâ* is not always understood in the sense I have given it. This is explained in Collet Sandars' "Justinian" (2nd edition), page 205. It is thought that the text may rather mean that the right of usufruct lasts *as long as the substance of the estate itself lasts, or is preserved.* This meaning, it is argued, agrees better with the context, which goes on to say that if the estate ceases to exist, the usufruct ceases also. However this may be, it is quite certain that the meaning I have given is *a* correct meaning; it is adopted by all the German writers, Schenk, Profr. Bluhme, Roth, &c., and it is obviously borne out by the general terms of the law, which required that the *substance* should never be *altered* (as forest land being turned into arable, or a field being built over), and that it should be used and the fruits enjoyed "as by a good paterfamilias," *i.e.*, with due and prudent care. "The Roman jurists," remarks Eding (page 67), "who, for the most part, are only concerned with rights of usufruct created by testament and granted only for one life, held firmly to the principle that the usufructuary cannot alter the character of the estate, even to the improvement of its yield: for example, Ulpian denies him the right to root up a warren or common woodland and plant fruit trees instead." This is surely *salvâ re substantiâ* in the sense above applied to it.

taken up in supplying the aggregate requirements of a number of rights, but that is quite a different thing from the right called *usufruct*[4].

Such a right of user might, of course, by the terms of the grant, or by the result of long prescriptive exercise, be claimable in a particular way, or consist of a right to a certain quantity of the produce; but in the absence of such express terms, it was always understood that the right of user was limited to what was sufficient for the daily use of the right-holder and his family only Here, therefore, no possibility of touching the estate itself, or permanently injuring, weakening or reducing its productive power, was contemplated.

§ 4.—*Modern authorities: German writers.*

Turning next to modern authorities, the German writers are particularly clear on the subject. The first passage I shall quote is somewhat long: but it expresses the whole argument so forcibly, and yet so justly, and in a manner so suitable to Indian circumstances, that I cannot curtail it.

"Exactly," says Dr. Pfeil[5], "on the same principle that the owner of any property is obliged to use the same in such a way as not to injure his neighbours or endanger the welfare of the whole community[6], must forest rights be exercised, within certain limits. The State, then, is entitled, without paying any compensation, to

[4] As a matter of fact, I have never heard of a case in any part of India in which Government had granted away the entire usufruct, that is, everything in the forest except the proprietary right. In another connection I have alluded to the opinion of Proudhon on this subject. That eminent jurist was not the least likely to undervalue the possible claims of right-holders against the forest-owner; but he says (Meaume, Vol. I, p. 250, § 192) that it can never be supposed that a grant of rights meant a concession of the entire products of a forest, for that would be almost as much as to alienate the estate altogether. It is always reasonable to suppose that the forest-owner intended to associate the right-holder with himself in the enjoyment of the forest and its produce.

[5] Pfeil, § 2, p. 4.

[6] The allusion is to the well-known legal maxim "*sic utere tuo, ut alienum non lædas*"—so use your own right as not to injure another man's.

reduce forest rights to such an extent, but to such an extent only, as the public welfare demands. Many,— indeed most—forest rights originated at a time when either little value was attached to the forest, or when such small demands were made on it, that it would always supply the produce, however little care was bestowed on its management. The slender population found wood for its wants in superabundance, and nature unaided readily replaced the small quantities of produce removed. The very few cattle that grazed over a vast extent of forest offered no material hindrance to the growth of the young trees; if dead leaves were removed for litter, it was in too small a quantity to do any perceptible damage. But soon all this was changed. When population increased, cattle multiplied, cultivation extended, and new industries were called into existence; and this resulted not only in diminishing the area under forest, but in taxing more severely the productive power of the area that remained. The pressure on a forest, which is used by all the inhabitants of a certain place or district, increases enormously when the population grows to three or four times its original figure. The forest is then called on to supply an amount of wood and other produce that would exceed its possible yield even under the most careful management. It is hence unreasonable that the rights of outsiders should be exercised to such an extent as to make the maintenance of the forest and the reproduction of the trees impossible.

"When the increased population require wood and grazing for their very existence, it is the duty of the governing power to remove all obstacles to the cultivation of the soil, so that these necessaries may be produced in adequate quantity. Just as the State is required to obviate everything that is opposed to the most effective employment of labour, so that every inhabitant of the country, who can and will work, may be able to support himself, so must it secure freedom to every owner of land to employ that land in the manner most advantageous to himself and to the commonwealth.

"Accordingly, every one who exercises a right in another's forest must submit, without any claim to compensation, to such reasonable limitation as will enable the forest to be maintained as such.

"The devastation of a forest should, indeed, be preventible by any owner of his own free right; how much more so when such devastation is detrimental to the interests of the State at large.

"In mountainous countries avalanches and landslips may be caused by such devastation. Soil may be washed away by the force of water running off denuded areas; the lower lying estates may be covered with detritus, and dangerous floods may be caused by the sudden rising of mountain torrents. In sandy districts, forest destruction may not only produce dangerous sand-drifts, but may cause deterioration, to an enormous extent, of the culturable soil in the vicinity. Springs dry up; the climate becomes more rigorous in winter, and hotter in summer; there is no protection against storms (and forest is often in this respect an indispensable protection to agriculture): in short, forests provide the most necessary requisites of life, so that without wood, even the most fruitful country (how much more so in an inhospitable climate) would become uninhabitable.

"On the same principle, even an absolute proprietor of a forest must submit, in the public interest, to have the utilisation of his forest circumscribed so far as is necessary to maintain its existence: and if this is so, *à fortiori*, the person who has only a right of user in the woods, can be treated in the same manner. For there are many rights which, exercised without restraint and to the greatest possible extent, would be so destructive that no forest could survive them. Where numerous herds of all kinds of cattle roam through the whole forest, no young trees can grow up, nor can the material cut out be ever replaced. Where the removal of *humus* or surface soil is so extensive that even places full of seedlings are cleared of dead leaves, pine-needles, &c., the ground will at last lose its power of nourishment, and especially if it is by nature poor, nothing more in the way of useful wood can be grown on it.

"When trees, however young, are tapped for resin, they can no longer be got to grow up into timber of useful size. Consequently, it is not only the right, but the duty of Government, to limit the exercise of forest rights to such an extent as the maintenance of the forest demands; and for this, as I have said, the right-holder has no claim to any compensation.

"This principle is undeniable and is admitted on all hands. Every civilised Government has made it applicable to the protection of its forests."

So Eding[7]: "Just as it is true on the one hand that the owner of the forest must so direct its management that the right-holder may always have a forest in existence wherein to exercise his right to it is true, on the other, that the right-holder has a corresponding obligation not to exercise his right in such a manner that the forest (which is the *perpetua causa* of his right) should be destroyed and the estate itself, in substance, injured[8]. He must, just as much as an usufructuary[9], exercise his right *salvâ re substantiâ;* that is, without injury to the permanent yield-capability of the forest (*nachhaltigen Ertragsfahigkeit*).

"You cannot naturally expect an individual right-holder to impose this restraint on himself, and against his own interest; the injury caused by excess may be such as does not become fully manifest in the lifetime of one man; to know how and when to restrain the exercise of a right, requires an amount of professional training, not to speak of foresight and self-denial, which it is impossible to expect to find in the right-holder himself.

"The law has therefore stepped in and secured the existence of the forest by prescribing the regulation of the exercise of rights.

"The limitations imposed by law are mainly directed to this object, namely, that the forest-owner may be able to work his forest by regular progressive cuttings, and to close a certain extent of the

[7] Eding, pp. 76, 77.

[8] See also the Prussian *Allgemeine Landrecht*, Tit. 22, Theil I, § 80.

[9] See page 104, *ante*, where I explained this.

area cut over, with a view to reproduction. In such areas the forest-owner may preclude the exercise of rights of user, until the trees have grown up to such a height that they are out of danger."

And Dr. Roth[10]: "A right to wood can only extend to the regular yield of a forest in its original or normal condition. To demand more would be to attack the capital or estate itself, and so contradict the essential idea of a 'servitude.' Rights to other produce must also be exercised within such limits that the 'substance'—the forest soil and growth—be not injured[1]."

§ 5.—*French authorities.*

The French authorities are no less clear. The Code (Article 65) lays it down distinctly that rights can only be exercised to the extent which the state of the forest and its normal yield-power justify. *L'exercis des droits pourra toujours être reduit par l'administration, suivant l'état et la possibilité des forêts*[2].

Grazing rights can only be exercised in parts of the forest declared "*defensable,*" that is, of such an age that the trees will not be injured (Code For., Art. 67).

[10] Roth, § 257, p. 263.

[1] The Saxon law requires that all such rights should be exercised "with the least loss to the proprietor" (*Burgerlicher Gesetzbuch*, § 524), and by the "Mandat" (concerning forest rights) of 1813, in the same kingdom (see Qvenzel, p. 201), rights are subject to "such limitations that the property is not destroyed." Grazing rights are limited as described above in the extract from Dr. Roth's work (Mandat, §§ 7-8). The Bavarian law is practically the same (Law of 1852, Art. 23). Dr. Roth, commenting on this law, says: "the existence of an *unlimited* right is inconceivable, for that would be to make the right-holder the same as a proprietor." The Austrian *Forstgesetz* has similar provisions (§§ 8-9: Grabner, p. 201, &c.) Nor are rights to be restricted, only to such an extent that the forest "*is barely kept alive*:" it must be so that the forest can be managed in a reasonable manner. See also, generally, on this subject, von Berg, p. 179, and authorities there quoted.

[2] *Possibilité* is the quantity of material which can be taken annually from the forest consistently with maintaining it in a healthy condition of permanently sustained yielding-power. Nor was this a novelty in the Code. An old Ordonnance of A.D. 1376 (Meaume, § 271) had nearly the same provision, which is repeated in laws of the 15th and 16th centuries, and in the celebrated Ordonnance of 1669 (although Proudhon, contrary to all the later jurists, attempted to give a different sense to the term "possibilité).

M. Dalloz[3] says the same thing: "Consequently, forest rights can only be demanded within reasonable limits, such as a proprietor himself must submit to, when managing his estate as a good '*paterfamilias.*' No right-holder can ask the proprietor to let him have material in ruinous quantities which would compromise the future of the forest. And hence the law lays down (Article 65 above quoted) that the exercise of rights must be according to the state and normal yield-power of the forest.

"These are the limits of the obligation of the proprietor, as the personal wants of the right-holder are the limits of his right."

The author goes on to quote with approbation a passage from the famous jurist Merlin (Répertoire V, Pâturage, § 1, No. 17), who says: "It has been admitted by the legislation of centuries that such restrictions shall be placed upon rights of user in forests, granted in general terms (or at a time when the value of land was not appreciated as it since has been) as the conservation of these important public and private properties requires."

Meaume[4] has taken this principle for granted, and contents himself with showing its antiquity, and arguing that the limit is the state of the forest and its yield-power (*possibilité*), as judged of professionally.

§ 6.—*Italian authorities.*

The Italian law of 1877 (Article 29) declares that no right in the forest subject to forest law, can exceed the limits of a right of user as defined in the Italian Civil Code; and that is, that the right can only extend to the actual personal wants of the right-holder and his family[5]; and in Article 34 it concludes by saying that where rights are exercised in the forest, they are to be subject to "regulation."

[3] Répertoire de Législation, Vol. 25 (Paris, 1849), Article "Forêts" (Cap. 15, Sec. 1, No. 1403).

[4] § 271 *et seq.*

[5] Codice-Civ., § 521.

§ 7.—*English authorities.*

The English law, as might be expected, does not furnish us with authorities quite so distinct, because there are no large areas of natural forest, and questions of the kind now under consideration rarely or never arise. Nevertheless, there is enough to show that the principle is recognised. Thus Cooke[6], speaking of grazing rights, says: "Rules for the protection *and limitation* of the right are among the earliest provisions of the Common Law;" and again: "It is contrary to the very essence of a right to turn out such an unlimited number of cattle by which the whole of the herbage might be consumed * * * * Such a user the law considers not as a right, but a wrong." "You could no more," the author goes on to say, "acquire by prescription such an unlimited right, than you could acquire a right to clip the Queen's coin[7].

§ 8.—*The principle rendered applicable by the circumstances of Indian forest rights.*

It remains only to dispose, much more briefly, of the third position I proposed to take up, *viz.*, that the history of the growth of forest rights in India offers no reason why such a principle should be regarded as inapplicable, but that the contrary rather is true.

I have already remarked that, in India, forest rights are nearly always "prescriptive," or have grown up by long customary exercise. It is only in some cases that orders at a land revenue settlement, or specific grants or "parwánas" from Government, have declared, conceded or originated, rights of user in a forest.

The majority of these rights grew up at a time when the "waste" was abundant, and the Government of the day did not care to interfere with its use.

[6] Cooke, p. 4.

[7] Cooke, p. 25. Williams does not expressly mention the subject, but he quotes several cases which show that claims to indefinitely extensive rights of common are bad at law.

Whether under the circumstances, even a majority of such rights rest on a really legal basis of prescription—that is to say, whether a title has been acquired strictly within the meaning of section 26 of the Limitation Act, 1877—may fairly be doubted[8].

If that is the case, then the reasonable limitation by Government of practices which may be, after all, in the eye of the law, only licenses, would hardly require to be argued for or supported in detail at all[9].

I do not, however, wish to raise any such questions, nor is it desirable that what are practically and equitably rights should be subjected to any process of subtle argumentation. I prefer what has been (and no doubt will always be) the practice of Forest Settlement Officers, to treat all really long-established customary practices, in themselves reasonable and required for the well-being of the villages and individuals in the neighbourhood of the forest, as *virtually rights;* and I would have them limited where it is just and necessary, not on any supposition that they are only licenses, but as

[8] It is not too much to say that if forest rights in India had to be established as rights of common have in England, two-thirds of them would not stand the test.

You have always to show that either you and your ancestors, or you, as the holder of a certain estate, and those who preceded you in that estate, have the right. A *custom* alleging all *the inhabitants of a place* had a right of grazing, was held bad (Williams, page 13), because there was an indefinite and fluctuating body, not that each person had a right as an ancestral one, or was attached to an estate which he held. Custom may be pleaded to establish a particular *incident*, to show what a right extended to; and copyholders can plead custom for a right in the manor of which they are tenants; but this is an exception (Williams, p. 194).

[9] In a paper read before the Forest Conference in 1873, I endeavoured to classify forest 'rights' into (1) strict rights and (2) privileges, urging that the latter are of course always limitable at the will and pleasure of the Government. I now think, however, that the natural, legal and equitable limitation which is inherent in all rights as exercised over another's property, is quite sufficient in all cases; and that the legislature has done wisely in saying nothing of privileges, which in fact have no place in law at all, and treating the whole question as practically one of rights. I may here remark that the term "privilege" is much used in this sense, in India, but that it now must be abandoned. If a standard dictionary be referred to it will be seen that 'privilege' properly means a *right* of the strictest sort. The term now properly used (see Act V of 1882 for example) is 'license.'

rights limitable on the basis of an equitable, civilised, law of rights[10].

I only wish the origin and history of rights in India to be borne in mind, lest any one should urge that, however authoritative the principles I have established in European law, it ought not to be applied in India.

It is not questionable, as I have elsewhere fully shown, that the unoccupied waste in India always belonged to the governing power. But for centuries that waste remained largely in excess of the cultivated area, and the people from the villages wandered into it at their will and took what they wanted from it, no one preventing them. But the moment the governing power desired to make a grant of the waste to be brought under cultivation, the land was given as an unencumbered grant, and the exercise of grazing, &c., simply had to cease[1]. No one would have dreamt of such a thing as compensation for the stoppage of the practices of grazing and wood-cutting: Those that had cattle simply moved on to the next jungle; wood-cutters removed to the next hill-side: that was all. In the same way, whenever the monarch wanted a "shikárgáh," or hunting preserve, or a place for his stud to graze in, he at once took the land and prohibited any interference with it, and often punished with barbarous severity any attempt to trespass or infringe his prohibition. Nor did the ruling power hesitate to issue orders, which were really orders for the conservation of the forest in so far as the intelligence of the day understood it. These orders generally extended to declaring teak, sandalwood, or blackwood (or whatever it was) to be "royal trees," not to be touched by any one; and in many provinces these orders have been made use of in forest conservancy to this day.

[10] Of course there may be in India, just as in Europe, real "licenses," (*concession* of French law) not in any sense rights, and dependent solely on the pleasure of Government; but these have nothing whatever to do with rights or with forest settlement.

[1] See this admitted, though not so directly stated, in the Kanara Judgment (p. 222). It is, however, quite beyond question.

The State was therefore in the position, not of one who granted rights or who suffered them to grow up adversely, but of one who knowing that he can interfere at any moment, simply does not care to do so.

It is the result of Western Government, and the security it brought, that population has increased and cultivation extended. The waste, once so extensive that thousands of cattle might roam over it without doing harm, and any amount of wood be cut, gradually became so restricted that it is only in the great hill ranges, and in certain districts which can be enumerated in a single breath, that anything like the primeval jungles and forests of former days now remain. In not a few districts there is no forest at all, and in very many, actual pressure has been felt as regards the area for forest grazing and the supply of wood.

When it began to be realised in India that *forests had a necessary place in the natural organisation of the provinces,* and that wherever forests still existed of any valuable extent or kind, they should of necessity be preserved; when, too, our last settlements began to determine what waste belonged to the villages and what to Government, then for the first time the idea of a *right* to graze or to cut wood, which was antagonistic to the desire to demarcate and preserve the forest, came to notice.

As I said before, I am not arguing—far from it—that it was not perfectly just and proper to admit these ancient and necessary usages to the position of "rights," and to give them the designation they were best entitled to. It was impossible to secure by law the rights of all classes without adopting the terms and to some extent the definitions of Western law. And just as we have conceded a "proprietary right" in land, some may concede a "prescriptive right" to forest produce. But admitting the propriety of the term "rights," I must contend that the origin of such rights should not be forgotten, and this certainly makes it more than ever reasonable that Western principles regarding the true nature and the necessary limits of such rights should be applied, as well as the legal name and its beneficial consequences. If there was nothing to prevent a Ráj-

put Chief, a Mughal Emperor, or an Amír of Sindh, from absolutely closing large areas of forest for the selfish purposes of sport, how much more reasonably can it be urged that the present Government has a right—for the public welfare and for future safety—to insist on the conservation of its forests, and for that purpose to regulate the rights of user in them, to what is necessary for the safety and permanence of the forest.

§ 9.—*Some consequences of the principle.*

It follows naturally, that if a right can only be so exercised that the property is not injured, there *can be no such thing* as a *right to do a wantonly destructive act*, or to a usage exercised in a manner destructive to the forest soil and growth[2].

No person, for instance, could conceivably have a *right* to go about a sál forest, killing outright stem after stem for the sake of a small cup of resin, worth perhaps an anna or two—if so much. If there was a right at all, it would be only to extract resin in some way not inconsistent with the proper maintenance of the trees.

Some rights are in India habitually exercised in a destructive way. Some who have perhaps a real right of grazing, insist that, for its proper exercise, it is necessary to set fire to the old grass clumps, so that new and tender grass may spring up. Where this is done in a forest, so that trees or brushwood (that are of any value as part of the estate) are injured, it is clear that Government has a perfect right, while allowing the grazing, to put a stop to its exercise in this destructive manner.

Nor is it of any force to argue, that popular opinion (and even that of some persons who ought to know better) maintains that forests are not injured by fire passing through. If it is a question what is injurious to a forest and what is not so, it is necessarily professional opinion—as competent as can be had—that must be taken, and not the opinion of ignorant and unlettered persons, or what is held as the "popular idea" on the subject.

[2] It has been expressly decided in England that there cannot be a prescriptive right to do an unlawful thing (Attorney General *v.* Mathias. See Williams, p. 177).

I here purposely omit the mention of the practice of temporary cultivation called "júm," "bewar," "kúmri," "toungyá," because there are other questions and considerations involved, which we are not, in the present stage of our study, in a position to discuss. The matter will be fully dealt with in a later section.

SECTION II.—THE EXTENT OF THE NECESSARY LIMITATION OF FOREST RIGHTS.

§ 1.—*It must permit the maintenance of the forest in a satisfactory state.*

A question will naturally arise regarding this principle. Granted that a certain regulation of rights is justly admissible on a true understanding of the nature of a forest right, to what extent can this limitation proceed without giving rise to a claim for compensation?

This must, especially in a country like India, depend to a great extent on the merits and circumstances of each particular case. The general rule is that the right can always, without compensation, be restricted to what the forest will bear, without either (*a*) injuring it if it is at present in a good state, or (*b*) preventing its restoration and improvement if it is in a bad state. When it comes to the question how must rights be regulated in any given forest, of course the forest will have been professionally examined and reported on; and it will then be known what portions of it can be left open to, and what must be closed against, the exercise of grazing or of any other right; what quantity of wood can be given to right-holders, and what cannot.

The Forest Settlement Officer will naturally require all this to be explained and justified to him, and there may be of course some discussion and reference to higher forest authority, or to the orders of Government, before the matter is settled. But however that may be, it (the question whether a given forest can or cannot properly bear such and such rights) is ultimately a question of fact, which must necessarily be decided on the basis of the best professional advice which is available.

§ 2.—*Under what sort of management is the forest to be put?*

Here at once, I think, it will be evident that the question what amount of grazing and wood-cutting or other rights a forest can *properly bear without being injured,* is dependent on *what sort of management* the forest is to be kept under. If I am content with a very low standard of management, it is obvious that I need not require nearly so much restraint on rights, as if I desire to adopt a very perfect or high standard of management. Consequently, the question how far it is lawful and reasonable to regulate rights in a forest, depends very greatly on this further question—what degree of excellence in management is the forest-owner entitled to be allowed to attain? Given, that standard, rights must be regulated to such an extent as will enable him to attain it.

This will be understood by an example in the concrete form. It will be easily admitted that if I have, say, an oak forest, in order that I may work and utilise it properly, I must always be allowed to have a certain area closed against grazing, so that the requisite area of seedlings and young growth may be given a fair chance of coming up. I must also require that the whole of the acorns which fall, are not grubbed up by pigs under a right of "pawnage," or I should have no seedlings. Here it is easy to decide that the terms I demand for the management of my forest are moderate; having an oak forest, I merely demand what suffices to maintain it as an oak forest, in a proper gradation of ages; consequently the limitation of rights asked is only just and reasonable. But supposing I desire to put my forest under treatment to change acre after acre into pine forest? Here I shall virtually deprive the right-holders of the necessary material altogether. There will soon be no acorns, and the grass will be very much less, if any at all remains. Suppose, further, that this conversion should be a great improvement, a step which largely increases the value of the forest to the public,—can I limit rights to the extent which will enable me to carry it out? Or take another case. It is often highly to the interest of forest conservancy to convert a *coppice* forest into a *high-timber* forest; can I at once make the necessary cutting, so that

after it is done there will be nothing left to satisfy rights to firewood which may previously have existed ?

§ 3.—*Different answers propounded.*

In some systems of law it is maintained that the exercise of rights can never extend to prevent "that scientific and thorough management of a forest which has for its object the largest permanent yield of the most valuable kind of timber." In that case the above questions would be answered in the affirmative.

It is, however, difficult to agree to this conclusion. Such a rule seems to err by looking too exclusively at one side. The value of the rights, as conducing to the welfare of the population, must also be taken into consideration. When that is done, it may at once appear that a high production of the most valuable timber may show the greatest positive income, and yet the forest may not be producing what, in the largest economic sense of the term, is the most valuable return[3].

The production of the direct revenue to the State is of great importance, and of such obvious value that no one is likely to underrate it[4]. But revenue is not the only thing to be considered. It may happen that a forest kept partly for grazing and partly for wood may be the most practically valuable, and may best answer the end of public forest estates considered from a broad point of view.

Dr. Pfeil remarks that in the beech forests of the Danube provinces, the feeding of animals on the beech-mast is of more value than the wood; and that even resin production may be of the same extensive value.

[3] See this well explained by Pfeil (p. 7, § 3). He puts it:—"*Dass man leicht die Holzerzeugung vermehren, und doch den Gesammtertrag des Waldbodens für das national einkommen vermindern.*"

[4] And I may take this opportunity of calling the attention of students to the fallacy of those complaints, which one sometimes sees in public prints, that forests should be retained with the "selfish object of filling the treasury"—as if Government was a private company, whose treasury was for its own enjoyment; and as if the revenue from forests did not always *pro tanto* save the people at large from having to *pay taxes*, to make up the same amount, if the forests did not yield it.

§ 4.—*The answer accepted.*

It is evidently then a principle to be accepted in India, that both sides must be considered, and that such a management of the forest must be allowed, and such conversion and improvement of the forest provided for, as is in each individual case consistent with a thorough respect for *all* the conditions.

And the meaning of the Indian Act, where it speaks (section 15) of the "maintenance of the forest," or the "due maintenance and improvement" of the forest, will be generally found conformable to this principle, if it is interpreted to mean (1) the *maintenance of the forest in a normal condition, such as is proper to a well-managed forest of its kind*, whether a high-timber forest (in the case of teak [5], or sál, or deodar, or other trees usually of timber dimensions), or to a coppice forest, such as a "rakh," or fuel reserve, and so forth; and (2) *if the forest is in a bad or ruined condition* (the result of fires, over-cutting, over-grazing, or any other cause), *its improvement, by partial closing, planting, and other recognised methods of restoration.*

If the forest is in a fairly good state to start with, the regulation of rights must extend to what is needed for keeping it in a good state: its reproduction must be allowed, and provision made for attaining the object of all forest management, namely, the establishment of a graduated scale of ages, a properly proportionate area of the whole area being occupied by each.

If the forest is *not* in a good state to start with, rights must be so regulated as to facilitate its restoration.

In such cases the remarks of Eding will be found applicable [7]: "It is always admissible for the forest proprietor to place under management a forest not yet subjected to a regular periodical working; and he should then be allowed to divide his forest (according

[5] Speaking generally, in some parts, and especially where teak begins to pass its natural geographical zone of effective production, it appears to produce only *poles*, and then coppice forest *may* be its normal condition. But I do not know that our knowledge as yet enables me to say this positively.

[6] Eding, page 87.

to the opinion of professional foresters) into compartments to be successively worked (*Schläge*) and to keep a certain number of them closed against grazing. And so in an altogether ruined forest, the owner may always divide it into compartments for treatment, and keep a portion of them closed, provided he makes his division in such a way as to afford proper space for the feeding of the cattle which the right-holder is reasonably entitled to pasture.

And if it is asked whether, under the head of "restoring" a forest, I conclude the change of a coppice forest into a high-timber forest, I reply in the affirmative, because the advantage to the State may be very great. But I am led to this answer because such a plan of conversion *can* be carried out gradually, or perhaps over part only of the whole area; and as provision *can* be made for firewood rights, and as grazing is not affected materially, there is no reason to include such a conversion among those total and complete changes of management which virtually diminish the enjoyment of rights beyond what is fair, and therefore give rise to a claim for compensation. This opinion is supported by the continental authorities. In all such cases the working plan, or forest cultivation plan, will be so arranged as to close portions of the forest only at one time, so that rights can be exercised in the other parts[8]. Both sides will be considered and arrangements made accordingly[9]. If it were not possible to effect such a change from an inferior to a higher standard of management without materially interfering

[7] See also Roth, § 266, and authority quoted. The right of grazing cannot prevent the conversion of a waste (*ödung*) into a forest by planting (or into any other useful property, meadow, orchard, &c.) So the Saxon Mandat of 1813, § 15; only the conversion must be piece by piece, to allow the rights to go on, otherwise compensation has to be awarded.

[8] See *Schenk Forstrecht*, § 189, and the Saxon law (Mandat of 1813), § 11.

[9] It would also follow that a right-holder can never demand a change in the management from good to bad. For example, a grazier cannot desire that the method of "selection-cutting" (of single trees or small groups), where it is proper, should be exchanged for "clearance-cutting," *i.e.*, felling by large clearances, so that more grass may grow. See Meaume, Volume I, page 373, § 292, and, to the same effect, Roth, §§ 226-271.

with the rights, I should certainly say that it could not be undertaken; unless, indeed, it were determined by authority to be so desirable, that it was necessary to proceed to the expropriation and compensation of the rights of user.

What the precise application of such data is to be in any given case must, as I have said before, be ultimately dependent on a decision based on the reports and opinions of professional foresters.

If the state of the forest is such that the area which must be closed [10] leaves the extent of the available portion too small to provide for the rights to a reasonable extent, or if the extent of the rights is such that any sufficient closing of the forest would seriously interfere with them, then the provisions of the law relating to the commutation of the rights must be applied.

§ 5.—*Case where a very high standard of management is desirable.*

It may be added generally, also, that if it is desired to go beyond a merely sufficient and naturally indicated forest management, and produce a more valuable class of products, then the necessity of such a case must be judged of by the Government, or the rights must be bought out.

This would be the case where an area at the head-waters of a stream, or necessary for some protective purpose, required to be absolutely closed, or entirely replanted, at once. Such a case of necessity needs no comment. In these cases even *private* property in the forests may be interfered with, and therefore *à fortiori* rights of user, where the property is that of Government.

Speaking generally, however, of cases where no such exceptional necessity is apparent, and where only it can be said that it is highly desirable, for revenue purposes or for trade interests, to alter the management and the class of forest, then this cannot be admitted to the detriment of rights, *i.e.*, if it requires more restriction on

[10] Remarks as to ascertaining the proportion of forests to be closed to grazing, and on the area of different forest soils which different kinds of cattle require per head, will be found in a later section on Forest Rights, under the head of "A.—Grazing."

them, than a normal business-like management of the forest would involve [1].

§ 6.—*Can rights be limited beyond the ordinary standard, even on compensation?*

It may also be asked whether in such a case the improvement

[1] As to the case of turning an oak or deciduous forest into a coniferous forest (which produces less grass) see the remarks of Eding (page 93). The loss of grass in quantity may be counterbalanced to some extent by the less area of the forest which needs to be closed against grazing in a conifer forest. The circumstances of the case must be considered. A complete change cannot be made if, under given circumstances, it would seriously or unfairly injure the right-holders. von Berg (page 186) gives authorities for drawing a distinction between the cases of limitation of rights (1) where it is necessary for the existence of the forest in a normal condition, and (2) where it is necessary to enable the management to be altered to one by which the *very most* can be made out of the estate. In the first he shows (as above established) that limitation is always admissible; in the second case, that at least the rights have to be compensated.

The Bavarian law (March 1852, § 23) requires that the forest-owner should not change the management of the forest (that is, the normal business-like management) to the detriment of rights, without giving notice to the right-holders, and if they show that real loss will accrue to them, paying due compensation. In March 1878, the (English) Journal of Forestry noted (without, however, giving the name and reference) a case tried at law, in which, in an oak-coppice forest, one person had the right to cut the coppice poles (and it would have been just the same if he had been the owner of the forest, cutting his own wood), and another the right to feed pigs on the acorns that fell. The latter objected that if the coppice were cut, no acorns would fall, and his right to feed pigs would virtually fail and be reduced to nothing. (Allusion to this case will also be found in the "Indian Forester," Vol. III, page 341.) No precedent could be found, but it was decided that the person entitled to the acorns could only have what were on the ground, and that he could not deprive the other of his right to cut the coppice. On the principle above stated, it would have been put, that the right of pawnage could not interfere with a reasonable and organised exercise of the cutting; but that the cutting should not be done all at once and over the whole forest simultaneously, so as to reduce the other right more than in the nature of the case was necessary. The report is only general, and I have little doubt that this is what is meant.

The English law allows the lord of the manor to close portions of the common for plantation (Cooke, p. 69) or for protection of young growth in woodlands (Cooke, p. 43). But in both cases the rights must not be materially interfered with, *i.e.*, the rest of the common left open must be sufficient (see also Williams, pp. 146—151).

The matter is, however, of so little importance in England, that the books give only a very cursory notice of the subject; and they have evidently so little considered the question, in the light in which it arises in India, that the authority of the books is not very satisfactory.

cannot be *made at all*, or whether it can be made *subject* to *compensation*. I think the correct reply to this question is that compensation is applied according to the judgment of the Forest Settlement Officer, with recourse to appeal and to revision by the Local Government. It would be for him to judge. If he thought the forest officers had convinced him that the change of management or the improvement was one which was greatly to the public benefit, he would commute the right; if not, he would require the exercise of the right to be provided for in the forest.

§ 7.—*Case of an aggregate of rights.*

Lastly, under this head, a question may arise as to the procedure in limiting rights *in the aggregate*. Supposing it to be determined that such an area of the forest only can be open to grazing and that so much wood only can be cut out of it. It may be that any one right-holder by himself, has a right which might easily be satisfied; but he is not the only man, perhaps a hundred others have also similar rights, and the aggregate it is impossible to supply.

Under the Saxon law[2], respect is had to the date of the acquisition of the rights; the oldest are served first, and then the later ones have to be curtailed.

This principle could hardly be adopted in India, and probably all would have to be curtailed rateably. Whether that curtailment would be such as amounted to a reasonable limitation, or was so serious as to be a real infraction of the right itself, is a question of fact. If the latter, the forest cannot be ruined, and compensation must be paid and the right got rid of.

SECTION III.—PRINCIPLES OF REGULATION APPLIED TO DIFFERENT CLASSES OF RIGHTS.

§ 1.—*Classification of forest rights.*

I shall at once proceed to the application of this principle, and

[2] Bürgerliche-Gesetzbuch (§ 529).

show how it is right and proper to regulate the different kinds of forest rights conformably to the principle.

Properly speaking, this section should be introduced at the point where I come to speak of the provisions of the Indian Forest law, regarding the Settlement-Officer's action in recording orders for the exercise of rights inside the forest. But to do so would be to introduce a long episode, which would break the thread of the narrative of the steps to be taken for constituting a permanent or 'reserved' forest which I desire to retain unbroken. I therefore, as a preliminary matter, dispose of the "regulation" of each kind of forest right.

The European text-books[3] classify these rights variously, according to the history of the subject and the nature of the rights which are customary.

For the purpose of this Manual it will be most convenient to deal with forest rights in the following order:—

(*A*) Grazing (or pasture).

(*B*) Grass-cutting.

(*C*) Lopping boughs and gathering leaves.

(*D*) Wood rights (classified under their several kinds).

[3] For example, Hartig's classification (Forst und Jagdarchiv Jahrgang, Vol. I, as quoted in Rönne, Die Verfassung, &c. des Preussichen Staates, 1854, Part 9; Abtheil I Forst und Jagd Wesen, pp. 716-749) is: I, wood-rights; II, grazing; III, grass-cutting; IV, "streu" (including the collection of heather, broom, turf, moss, &c., as well as dead leaves on the surface); V, rights to collect resin; VI, hunting; VII, digging for stones, limestone, loam, clay, &c.; VIII, rights to use of water and fishing; IX, rights of way; X, right of cattle-way.

Meaume, while stating that rights of user (*droits d'usage*) "may be as various as the wants and will of man," classifies the practically prevailing rights under two heads—*wood* rights and *pasturage*. Other rights are not specifically alluded to even in the Code. The right to collect *humus* (*streunutzung*), which occupies such a large space in most German books, and is indeed a very serious right, as involving the interference with the surface soil, is not alluded to. *Eding* deals with rights in the following order: I, grazing rights, including cutting grass and taking *leaves* for fodder (not lopping boughs, which is not recognised); II, rights of way; III, rights to dead leaves, &c, "streu;" IV, wood rights, sub-divided into building wood, industrial wood, firewood, dead wood, windfall and stumps; V, right to resin.

(*E*) Rights to scrape up dead or decayed leaves from the forest soil for litter or manure.

(*F*) Rights to other forest produce, *i.e.*, collecting honey and wax, flowers, fruits, seeds and plants, bark, resin, wood-oil, varnish, gum; digging gravel, laterite, limestone, clay, &c.; manufacturing "kutch" or catechu; and burning charcoal, lime, and "surkhi."

(*G*) Hunting and fishing.

(*H*) Under this heading I shall treat of the temporary and shifting cultivation called "kúmri," "júm," "bewar," "toungyá," and by other names in various parts of India and Burma. It may be doubted whether there is a strict right to this, but under many circumstances it is *analogous* to a right, and this is the most convenient place to treat of the practice.

All these rights will probably become, in one place or another, the subject of claims before the Settlement Officer. Wood rights and claims to pasture are, however, the commonest and the most extensive.

§ 2.—*The regulation of forest rights, how to be carried out.*

The general principle of the limitability of rights being established in the manner explained, the student will readily understand that the practice of countries in which natural forests have long been under rational management, has established certain principles of limitation for each class of rights so as to enable these rights to co-exist with the normal management of the forest.

Many of these principles will commend themselves as inherently reasonable, and should be studied as affording a practical guide in the work of settling rights in India.

We have not yet a body of rules, or decided cases of our own; we can therefore only argue from the analogy of the rules which have been found practicable and fair in other countries.

It will be borne in mind that I am here speaking of such *regulation* as is ordinarily necessary to ensure the proper management and reproduction, and to obviate waste and the gradual deterioration of the forest.

If the right so restricted were still such that forest management would be impossible, or if (as described in the last section) it is desirable to adopt such a management of the forest as necessitates a still further restriction of the right, so that its enjoyment would be seriously diminished, then the law refers the matter to the judgment of the Forest Settlement Officer, who (subject to the provisions for appeal, revision, &c.) may commute the right, *i.e.*, order its extinction subject to compensation.

A.—Grazing rights and grass-cutting.

§ 3.—*Questions arising.*

If the right-holders could graze an *indefinite* (*i.e.*, an unlimited) number of cattle, it is obvious that it would be impracticable to make any proper arrangements for forest conservancy whatever. Under cover of so wide a right, the claimant might introduce such a number of cattle into the forest that the owner of the forest would never get a seedling up and would never be able to re-plant a blank place. While, if it were attempted to confine the large number of cattle to a part of the forest, the cattle would starve, or the soil would be so overpastured and destroyed that in a few years nothing would remain.

The "happy mean" to be aimed at is to allow such a number of cattle to graze as will permit of proper periods of rest and protection to certain compartments or portions of the forest, while the remainder is grazed over, and that remainder should be of such extent that cattle can find sufficient food without being compelled to gnaw at roots of vegetation or trees, or pull down branches and bite off the young shoots.

The Indian law, therefore, requires that when cattle are allowed to graze inside the forest, it should be specified—

(*a*) what *number* is allowed ;

(*b*) what *kind* or description of cattle;

(*c*) within what *local limits* (portions of the forest) grazing is to be allowed;

(*d*) at what *seasons*;

as well as any other particulars regarding conditions necessary to be observed.

§ 4.—*The number of cattle.*

It very often, indeed most commonly, happens, that a grazing right is claimed in general terms, *i.e.*, it is not determined by the *terms of the right itself* how many cattle of each kind can be pastured in pursuance of it.

Under these circumstances, some systems of law have laid down certain principles for limiting the number of cattle which may claim to graze. These principles have no special reference to forests, and are equally applicable to grazing on a grass common, or heath, or any other place.

It should be remembered, however, that even where such principles are acknowledged as limiting the right in any case, the number of cattle may still be regulated according to what the forest can bear, whenever it happens that the right is to be exercised inside a forest.

Practically, therefore, the principles which I have alluded to are of only limited value; and with reference to *forest* grazing we do not care much about them. What is looked to is *the number which the forest estate* can properly pasture without injury to the forest, and that is really the only practicable principle to which ultimately we have to fall back upon.

It will, however, be interesting and profitable to understand also some of the principles first mentioned.

§ 5.—*Cattle required by owner for personal use. Cattle levant and couchant. Cattle for trade. Young of cattle included in number entitled.*

It is a proposition of general applicability, and one that we shall meet with again, that a right, not embodying by its nature any terms

to the contrary, always carries with it the meaning that it extends to the supply of the *personal and individual wants* of the right-holder, or of the house or land for the beneficial enjoyment of which the right exists. But this does not, in the case of cattle grazing, go any way towards defining the number.

In England and some other European countries, where the right is appendant (or appurtenant), it is always held that the number of cattle to be pastured, is the number which are "*levant and couchant*" on the dominant estate. This phrase means that it is considered how many cattle can live on the fodder available to the estate which holds the right during winter, when the grazing ground is naturally not available, and the cattle are kept in stall.

As many cattle as the estate can find fodder for during winter, so many, and no more, it may take to pasture in the servient forests, or other property[4], during the grazing season.

In India such a test as this would not be useful. But it would be probably advantageous to adopt some of the other methods indicated in the footnote. It may be desirable to *count the houses* in the village and consider what *each really requires* for plough cattle and for supply of milk, &c. If the number varies from time to time, it will be fair to *take an average*, and that average would be equitably based on a period of twelve years, which is so usually adopted in Indian law.

It is always held that cattle kept, not for ploughing or for household wants, but as *stock for commerce*, are not included in the

[4] See Cooke, pp. 10, 11, and 23.

The Hanoverian law (Landes Œkonomie Gesetzbuch, 1864, p. 19) adopts this principle if the plan of taking an average cannot be followed. The three methods are—

(1) To take an average of the cattle actually in possession during the last ten years.

(2) The wants of each house with reference to the quantity of meadow and cultivated land attached to it.

(3) The estimate from wintering of cattle as above.

The rule in the text is applied in Prussia when the number is not otherwise ascertainable (see Eding, p. 90), and it is the sole test under the Saxon Mandats of 1813 and 1828 (Arts. 18 and 17 respectively) as it is in English law.

number entitled to graze[5]. To include them would offend against the principle that personal and individual wants are the measure of a right of user. A man requires cattle to plough his land, and give milk to his family; but if, besides that, he keeps cattle to sell and make a profit of, he can well feed them out of the profits: they are not necessary to his personal or household wants. (I am speaking always of course of rights where there is no proof of special terms to the contrary.) Such a condition is, I believe, generally to be found in Indian Forest Rules when the number of cattle is not expressly fixed, and it is certainly reasonable.

It is also questioned by some of the European authors whether *the young of cattle* are to be allowed in excess of a number fixed by any such methods as I have mentioned.

Meaume[6] thinks not, because of the abuse which might arise and the facility with which a fixed number might be exceeded under this pretext. In Prussia the young are not counted apart from their dams as long as they are sucking. The Bavarian law allows the young to be admitted without counting, up to a fixed age of one year[7]. Some such arrangement will probably be adopted in Indian practice. It seems reasonable to allow the young for a time, but when they are grown up and commence to graze on their own account, they must be regarded as in excess of a fixed number, and be dealt with accordingly.

§ 6.—*Case of flocks in the Himalaya.*

I need only allude to one other point, which probably affects only the forests situated in the North-West Himalaya.

Here, besides the villages on the spot, where grazing requirements have to be met, we have to deal with large migratory herds of cattle, chiefly goats and sheep, which remain in the forest at different altitudes, during the season when it is not possible to

[5] So in the French law (Code For., Art. 70), and in Prussia, Eding, p. 90 (D).

[6] Vol. I, p. 420, § 350.

[7] Roth, § 267: and so under the Saxon Mandat of 1828 (Grazing), § 16.

occupy the "Alpine" or upper grazing grounds which are at a great altitude, above the valuable and workable forests. During the winter the herds live in the lower hills. In the Kangra district, for example, such herds have for generations past, regularly grazed over certain areas of forest known by custom; and it is held that these cattle-owners have now a prescriptive right to this annual grazing for the winter season. Here it would be very difficult to introduce any rule about *numbers*.

The same herds, when moving up to the higher grazing grounds, sometimes stay for a time in the forests of middle elevation, where the deodár and mixed forests are, and often do great mischief. This, however, is not always the case; the herds often merely pass through the forest and do not remain and graze.

Whether any such herds have a right of grazing in any particular locality, must depend on the facts; but the subject is one requiring clear settlement, because it presents an instance of a double claim on the forest. Not only have the rights of the villagers on the spot to be met, which is what we usually expect in Indian forests, but a separate and numerous body of claims is introduced, the admission of which would overtax the resources of the forest, and at the same time unduly restrict the local villagers in an enjoyment of the forest, to which they would seem to have a much more proximate claim than the others[8].

I do not think that it could be made out that any of these migratory herds have established even such an equitable claim as should be treated as a right, and it will be necessary in settling hill forests to examine this matter thoroughly. I believe, as I said before, that the graziers in Kangra are held to have a right, but then it is their practice to stay for some months, and they have

[8] In the Chumba State this practice is very noticeable; but there the forest is leased to Government, and therefore the matter is settled by the rules annexed to the lease. The lease does not acknowledge any rights but such as belong to local villages and resident right-holders. In the Kulu forest (Panjab Himalaya) attempts have been made of late years to bring in herds of buffaloes to graze. This has been very properly resisted. The forests are, by effect of former settlement orders, burdened with many *local* rights, but are in no way bound to allow outsiders.

established a customary distribution of the forest area among the different herd-owners, and they regularly return to the same beats year after year[9]. It is more than doubtful whether any right of this kind can be made out in the case of herds traversing the forests of middle elevation (where the grazing does most harm).

§ 7.—*Other principles of regulating the number.*

So far I have spoken of the number of cattle, with reference to limitations dependent on the right being solely for personal wants, and on other conditions not directly connected with forest conservancy.

But the principle which I have established, points to the fact that even should the number of cattle commonable, be fixed on some such grounds as those indicated, *still* the forest must be considered, and no person can claim to send into it such a number of cattle as would prevent its reasonable maintenance and improvement.

§ 8.—*Acreage required for grazing.*

I may take it as certain that in most cases,[10] *some portion of the forest* will be closed as being full of seedlings, or because the young growth is not quite safe. What this portion is to be I will consider presently.

Assuming, however, that a certain acreage is open and the rest closed, it is obvious that no more cattle can be admitted into this open portion than it will support properly.

This is the principle which all the European laws admit[1]. If

[9] And in some cases folding their sheep on particular lands which get the benefit of manure. I believe that in one case a land-owner brought a suit to compel a shepherd to continue to so fold his sheep. This is very curious, because in English law a right of this kind, called *Frankfoldage*, used to be recognised (Williams, p. 275); but Williams says "it is one of those oppressive rights which the law permitted in early days, but which, I think, would now be scarcely tolerated."

[10] I believe that in Burma, and perhaps other countries with extensive forests, where cattle are not numerous and forest-grazing is only required during the rainy season, it does so little harm that it is allowed to be general.

[1] See the Austrian Forstgesetz (§ 10), where it is laid down in so many words.

more cattle were introduced, the animals would be improperly nourished, and would then in their hunger, gnaw and tear up the very roots of the grass and herbage, and so injure the production required for future grazing seasons. They would consume all tree seedlings on the ground, which, were herbage abundant, they would pass over, and they may even be driven by hunger to reach up to or bend down young stems and destroy their foliage.

If, then, we know the acreage open in each forest, and can classify it,—how much is good grazing ground, how much middling, and how much bad; and if we know on an average what area of each sort will support a given number of head of cattle, it will only be a matter of arithmetic to fix the total number of cattle which might be admitted.

Unfortunately as yet we have no data, or no sufficient data, on the subject. We can only therefore, at present, go on an estimate, the best we can make in each case, after studying the ground. It is still fortunately the case in many localities, that the number of cattle needing grazing inside the forest, is not excessive in proportion to the area available. But this is not always the case, nor, it should be remembered, is such a state of things in any case likely long to continue. In some cases the difficulty has already arisen: for example, when it is desired to provide for a grazing right by cutting off a suitably convenient piece of the forest. Here it is very difficult to make a guess what is the area which should be excluded as sufficient for grazing of a given number of cattle. The collection of statistics on this head, and the gradual record of practical experience, is therefore much to be desired.

Those who are willing to look into the subject more closely will find it treated of in great detail by Dr. Pfeil[2]. The information, however, given by this author relates to such a climate as Germany has. It is only therefore by way of illustration, that I give a brief outline of the way in which this question may be studied.

[2] Pfeil, § 39, pp. 227—249.

The author recommends the division of the area into a few general classes according as it produces more or less grass and herbage; he proposes that trial plots should be marked off for each kind, and cattle fed on them so as to get at actual results. In the best soil (best as regards growth) $1\frac{1}{2}$ *morgen* (or acres) will feed one cow or 10 sheep; and generally, if 3 *morgen* will feed a cow it will take $4\frac{1}{2}$ to feed a horse, $3\frac{2}{3}$ to feed a draught-bullock, and $\frac{3}{10}$ to feed a sheep.

Or, in other words, given the area sufficient for one cow; multiply it by 1·5 to get the area for a horse, by 1·2 that for a draught or plough bullock, and divide by 10 to get the area for a sheep.

In all cases the value of each class as regards grass-growing, is liable to be much affected by the shadow of the trees[3].

§ 9.—*The kind of cattle.*

It will often be found that, looking to the previous custom and practice, there is no doubt that the right as it stands, includes the grazing of goats or other noxious animals. And if the claim is to be admitted as a right at all, the grazing of these animals must be admitted as part of it. Therefore, the question of the prohibition of grazing, as regards certain kinds of cattle, injurious to the forest, is a matter of *regulation* or limitation of the right as it stands.

The animals which are most injurious are goats, camels and elephants.

§ 10.—*Elephants.*

Elephants of course may do great damage, but their grazing is so seldom required, and only in remote jungles, that practically it needs no mention. In some cases also it is effected by cutting boughs, so that the subject belongs rather to the question of lopping trees, than to grazing.

[3] See Revue des Eaux et Forêts, January 1881 (p. 5), for some French statistics. In France 40 head of cattle is the average to 100 hectares. A cow and a horse take the same: 10 sheep or 4 pigs = 1 cow. This gives about 6·25 *acres* to each cow.

In the mountain grazing grounds and forests of the Hautes Alpes, the average is 14 head to 100 hectares.

§ 11.—*Camels.*

Camels are, fortunately for forest interests, only found in parts of India, and mostly in places where a desert, scrubby growth renders it impossible to secure forests for any higher purpose than fuel-coppice. Nevertheless, in North India and elsewhere, these fuel forests are of great importance. The fuel-supply, not only of towns, but even of long lines of railway, may be more or less completely dependent on them.

Unless in such localities there happen to be an under-growth of such plants as camels eat (*salsola, coronylon,* &c.), camel-grazing means simply browsing on the top-shoots and twigs.

Prosopis spicigera, which forms large forests in the Panjáb, is an especial favourite with camels. Nor is it possible to prevent the herdsmen aiding this "grazing" in a peculiarly dangerous manner. As the animal does not like to stoop to eat, the herdsman attacks the leading stem of each tree with a billhook on a pole; he half cuts through the wood and then bends down the bough, of course tearing a long strip of bark and sapwood with it. The animals then reach and nibble at the hanging boughs.

No forest can possibly survive camel-grazing for long. In the case of the dry forests of *prosopis,* this species is so deeply rooted that it long continues the struggle; but the stems become gnarled and stunted, and even it must at last succumb.

Camel-grazing cannot, therefore, be allowed in any permanent fuel reserve, or in any dry forest of the lower hills.

It is best to give up tracts in the interior (as in the Panjáb "bâr") to this purpose. Camels are in fact quite incompatible with a highly-cultivated district, and can only be reared successfully in the bâr and in desert countries.

§ 12.—*Goats.*

Goats are hardly less injurious: no forest can survive their attacks. Many species, which they do not eat, they nevertheless nibble at. The roots and stalks of vegetation also do not escape them.

"These animals," says Meaume[4] (without the least exaggeration) "are the scourges of the young forest; they destroy all hope for it. They paralyze reproduction, and a young tree once browsed must be cut back to the root if it is ever to recover."

By the French law (Code For., Art. 78) the grazing of goats in a forest is prohibited, "notwithstanding all rights and actual enjoyments of the practice to the contrary."

This prohibition is of very ancient date. It is found in the 15th article of the celebrated Forest "Ordonnance" of 1669[5]. In the days of Francis I, a law of A.D. 1541 recites still earlier laws having the same object.

In England, Manwood[6], speaking of the ancient times, when a "Chief Justice in Eyre," went his rounds to try forest cases, and took the opportunity of charging the forest officers as to their duty, tells us that one of the things which the Justice noticed was the subject of goat-grazing. "You shall enquire if there have been any * * * * * goats that have been attached since last session within the forest; of the number and price of them you shall do us to weet: for they be forfeitable by the forest attachment, for they be no beasts of common[7]."

[4] Vol. I, p. 424, § 354.

[5] Which did not allow goats even in "*places vaines et vagues*" (bare spots) on the borders of the forest, for fear they should stray into it.

[6] Cap. 24, p. 521.

[7] The same author (p. 222) records that, at the assizes of the forest of Lancaster (in Anne. 10, Session I), the townspeople claimed a right of grazing in the forest and got it. But it was then held for law that neither sheep, swine, nor goats are allowed to have common within the forest. And in the "*Assisa Forest a de Pickering : fol. 67*," it is also decided "that no man may common with goats in a forest."

It is probable that these early laws in England prohibited goats because they interfered with the forest for hunting purposes, or because of certain technical definitions. And Williams says (p. 168), that there might be a *custom* that goats grazed with other cattle on a common (though such a custom would not be possible in a forest). But still the existence of such a rule, long after the older barbarous forest laws had been swept away, shows that there has been always recognition of the fact that the lower interest must give way to the higher; the selfish pleasure of the chase may indeed have been a very poor representative of a higher interest, but the benefit to the whole country by forest protection is a really higher interest. The French law, from the very first, seems to have been *bonâ fide* for the protection of the forest.

The German authorities are also quite clear. Not only are goats forbidden by the Austrian law, but the 65th Article provides that if goats are found trespassing in the forest, and cannot be caught and taken to the pound, they may be shot.

von Berg[8] says that "nearly all the German States, and most rightly so, prohibit goats in a forest."

The Italian law does not expressly forbid goats; it probably considers the power of getting rid of rights, by compensation, sufficient.

In India, no forest law has as yet specifically prohibited goats. But there is the general rule that rights inconsistent with the maintenance of the forest are to be commuted.

As the foregoing authorities show that goat-grazing is regarded as inadmissible in nearly all countries where natural forests are properly cared for, it may certainly be concluded that a Forest Settlement Officer in India will, as a rule, be justified in deciding that goat-grazing is inconsistent with the maintenance of the forest, and directing its commutation.

But it should be remarked that this is not always necessary, and that where other plans of arranging for goat-grazing can be devised they should be followed.

There may be cases where it is a question of a few goats only for a household. The goat is often the "poor man's animal," and where provision has to be made only for a limited number in the village, it is particularly easy to give up a small corner of forest for the purpose. Where the herds are large, and there is no grazing ground, or only of limited extent, then the sooner the people change their habit the better. It should be borne in mind that where a population voluntarily establishes a state of things which is inconsistent with natural conditions, nature will sooner or later avenge herself, and compel the abandonment of the practices that oppose

[8] Pages 215, 219, and see Eding, p. 89; Prussian Grazing Regulation (22nd November 1838); Rönne, pp. 421 and 794. Eding mentions that goats are allowed in Prussia in places where they can do no harm.

her. It is of no lasting advantage to give up the forest, because the goats will soon cause it to disappear, and then *exactly the same result* will follow, as if the Forest Settlement Officer had refused to burden the forest in the first instance: the goats *must* go; only that then the public will have been injured, perhaps irretrievably, by the loss of the forest as well.

I am well aware that it is much easier to write things of this kind in paper than to make satisfactory arrangements in a given forest. But principles must be stated, and there can be no doubt that if Forest Settlement Officers once really understand the truth and appreciate the facts stated, the difficulty of making an arrangement will appear less formidable than it does when the mind still retains the conviction that goat-grazing does no harm.

It is always, as I have said, possible to provide for a few household goats: herds kept for milk on a small scale, or even sufficient for the supply of a large town, certainly *can* be maintained outside a forest, for they are so, constantly, in places where no forest exists: large herds such as those of the hill "gaddís" *can* only exist when "Alpine" pasture grounds are available.

§ 13.—*Sheep.*

In France sheep are prohibited as well as goats; but with the proviso that special permission for their grazing may be given. In England, as the previous notes show, sheep, as well as goats, are excluded from "common of pasture." In some German States sheep are allowed if there is grass[9].

They may be regarded as less noxious than goats, but should be prohibited wherever possible, unless grass is abundant.

§ 14.—*Buffaloes.*

Buffaloes cannot always be excluded; but they are very dangerous, especially on steep slopes, where their heavy tread lays bare the roots of trees, reduces the soil, and may even give rise to small ravines or water channels, which deeply indent the soil.

[9] von Berg., p. 219.

This fact must be borne in mind in fixing the *parts* of a forest in which such grazing is allowed.

§15.—*Extent of forest open to grazing with reference to state of growth.*

The data of European forests can only be useful here as an illustration of the method in which questions of the sort may be settled, and as an indication of the information we shall gradually require to possess ourselves of.

The French law, as to the extent of forest to be open, is very simple. The Code Forestiére (Art. 67) declares that grazing can go on only in those "*cantons*" or portions of the forest declared by the forest administration to be "*defensable*," *i.e.*, out of danger from grazing. A list of cantons open to grazing is published every year, and if any one contests this[10] he can do so by reference to the "*Conseil de Préfecture.*"

In most of the German States, the rule is that grazing rights may be kept out of those parts of the forest where the growth is so young that the tender shoots are in danger of being broken or browsed[1].

Long experience, however, has in these countries enabled an *age* of safety to be laid down for each different kind of forest. Moreover, as forests are under regular treatment, it will usually be a definite and known proportion of the forest area that is of each age.

Hartig[2] gives the following list of ages at which the forest is safe :—

High forest (deciduous) . .	20—25 years	(according as the rotation
Coppice (25 years' rotation) .	8—10 „	is 80 years or 100
Pine forest	13—16 „	years).
All blanks restocked . .	20—30 „	

[10] *e.g.*, objects to the propriety of the forest officer's decision as to the necessity for closing some places; complains that insufficient allowance for grazing rights is made, &c.

[illegible] § 266, and authorities quoted: Eding, 185.

[illegible] Rönne, p. 717.

Hundeshagen's table[3] is according to quality of soil which affects growth :—

		Against large cattle.		Against sheep.	
		Good soil.	Bad soil.	Good soil.	Bad soil.
		Years.	Years.	Years.	Years.
1	Beech and oak high forest (other deciduous forest a little less.)	18	24	14	18
2	Beech (simple coppice and stored coppice.)	14	18	10	12
3	Oak (simple coppice and stored coppice), (coppice of other species a little less.)	10	14	7	10
4	*Abies pectinata* and *A. excelsa* .	16	20	12	16
5	Pines and larches . . .	12	16	9	12
6	Poplars, willows, &c. . . .	6	9	4	6

The Saxon law[4] goes by the height of the trees. Thus, the forest is closed against—

Horses, till the trees are 6 *ells* high (about 19 feet).
Horned cattle, ditto ditto about 13 feet.
Sheep, ditto ditto 2½ *ells* high (about 8 feet).

Hartig[5] gives the same list, but fixes the height that is secure at 13, 9 and 5 feet respectively.

It will be readily understood that in all forests which are in a normal state of growth, a regular gradation of age classes will have been already attained, a certain proportionate area being occupied by each age. Consequently, if you have fixed an age at which the compartments are safe from damage, it is easy to point out what compartments are open, and will successively become so; and these will always be a more or less definite proportion of the whole

[3] von Berg, p. 280, &c.

[4] Mandat of 1813, § 8.

[5] *Forst und Jagd-Staatsrecht*, p. 175. Eding remarks on this, that height is not always a sufficient test, as oxen are in the habit of bending down young st[illegible] and eating off the leaves.

area of the forest according to the rotation period on which it is being managed[6].

I have gathered, by way of example, a table showing the proportions to be kept closed in different kinds of forest, as stated by different authorities. But these assume the forest to be in a fairly normal state—

Authority.	Kind of Forest.	Proportion to be closed.
Grabner (Austria) ..	All high forest	At least $\frac{1}{6}$
	All coppice (both simple and stored)	" " $\frac{1}{5}$
Hartig (As in Rönne, page 717.)	Deciduous high forest . ..	At least $\frac{1}{4}$
	" coppice, &c. ..	" " $\frac{1}{3}$
	Blanks[7] in either	" " $\frac{1}{2}$
	Coniferous high forest ..	" " $\frac{1}{6}$
	Blanks in ditto	" " $\frac{1}{3}$
Von Cotta (As in his "Waldbau" quoted by von Berg, p. 222.)	Beech and *abies pectinata* ..	$\frac{1}{4}$ to $\frac{1}{5}$
	Oak	$\frac{1}{6}$ to $\frac{1}{9}$
	Conifers generally	$\frac{1}{5}$ to $\frac{1}{10}$
	Ashes, elms, maples, &c. ..	$\frac{1}{5}$ to $\frac{1}{8}$
According to Hannover: Ablösung Ordnung of 8th November 1856.	Pine forest	$\frac{1}{7}$
	Deciduous high forest ..	$\frac{1}{5}$
	" coppice	$\frac{1}{4}$
	Unstocked and sparsely-wooded places	$\frac{1}{12}$

[6] Supposing a regularly-stocked pine forest to be worked on a rotation of 120 years, it is obvious that trees aged from 1 to 20 years will occupy one-sixth of the whole area; and if pine trees must be protected against grazing till the 17th, or, say, till the 20th year, about one-sixth is the proportion of a normal pine forest managed on such a rotation, which will always be under closure. A deciduous coppice will probably have a rotation of 30 years; then as coppice trees will be unsafe till 10 years old, *one-third* of the area, stocked with young trees 0—10 years old, will be under closure. An irregular or badly-constituted forest would, of course, require a much larger area closed.

[7] Hartig adds: "blanks, *if they are to be stocked,*" for it is often useful to leave [illegible]ks unplanted, at least for a time, so as to let grazing continue on them, and thus [illegible] rest of the forest.

These illustrations will, in India, serve only as indications of the direction in which we must labour to acquire data. Even if our forests were, as a rule, much more normally stocked than they are, the figures indicating ages and proportions of area would have to be adjusted to the facts of growth, climate, and so forth. But as it is, our forests are often in a highly irregular, if not partially ruined, condition, and have neither a constituted gradation of age classes, nor even a tolerably uniform covering of mixed age. We must, therefore, be guided by circumstances, and always allow for as large a proportion of area to be closed as is possible, without unduly diminishing the number of cattle which might otherwise be fairly admitted under the right established.

Where, as I have said, the forest is so injured that it is of importance to close it altogether, recourse must be had to compensation.

A very important point must here be mentioned in connection with the *locality* of the exercise of grazing rights. As we are rarely able to lay down beforehand a distinct series of compartments in which grazing will be allowed one after the other, as each attains a certain age, it is of the utmost importance to provide that, of an estimated *total* acreage to be kept closed, the forest officer in charge shall always have the power to determine *where* the closed portions are from time to time to be located. He will be responsible that he makes reasonably convenient arrangements; but under no circumstances is it right to mark permanent blocks inside the forest on which grazing is always to be allowed. The sites must be changed after a certain period, so as to allow rest to one place while another is open. The mistake of fixing open portions was unfortunately made in the Hazára Settlements, Panjáb. The consequence has been that already a marked difference between these spots and the rest of the forest is observable. In time these spots will become quite bare, and the arrangement will have to be revised[8].

[8] Grabner, p. 260. In the Hazára Forest the blocks opened for grazing are already distinguishable, not only on the map, but on the ground, their denuded surface being marked out at the first glance.

§ 16.—*The season of grazing.*

The regulation of this matter will often in itself secure a certain amount of protection to the forest, especially under the present necessity for a mere estimate of, or guess at, the proportions of the area which must be kept closed. It may be found that, locally, grazing is only required during certain seasons, and the absence of grazing at other times may not only emphasize the good done by the absolute closing of a limited portion, but may give the whole forest a certain period of rest, to its manifest advantage. Two points have to be considered—

(1) The season at which grazing is most wanted, and

(2) The season at which the forest most needs to be let alone.

For example, in the bamboo forests of Hushyárpur (Panjáb) grazing has always, in accordance with standing custom, been excluded during two or three months of the rainy season, when the young bamboo shoots are sprouting. In Burma, on the other hand, the rainy season is the time during which the forest is almost wholly uninjured by grazing, and fortunately this is the time at which forest grazing is required[9].

All interests must be considered, and certain compartments be closed absolutely, while others are opened at certain seasons or all the year round for a certain number of years.

Eding remarks[10] that cattle must not be admitted in open compartments too early in the spring, before the grass has grown, or else the cattle will be compelled to nibble at the twigs of trees just budding into leaf.

[9] It sometimes happens that in the deodar forests of the North-West Himalaya, in which a good crop of deodar seed does not ripen every year, it may be useful to allow cattle grazing over the whole forest during the period when herbage grows rapidly; the cattle thus keep down the growth and prepare the soil to receive the seed when it falls. Just before the cones ripen, all cattle must be excluded, and thenceforward be kept out of the portions in which the seedlings are growing, till they are of sufficient height to be safe.

[10] Eding, p. 88 (B).

§ 17.—*Other particulars to be regulated.*

A few other matters remain to be noticed, which I have found in the European text-books, and which may afford useful hints for Indian Forest Settlements.

It almost goes without saying, that where grazing is admitted, unless the grass is so superabundant that no diminution of the grazing would be caused by the practice, neither the forest-owner nor other right-holders can be permitted to spoil the grazing by cutting the grass first[1].

Most laws require[2] that a responsible herdsman should be appointed. In India, children are often sent out with the herds, so young that they cannot be held liable for trespass, nor have intelligence enough to control the herds.

Portions of the forest that are closed must, if possible, be protected by ditches 4′ by 2½′, over which cattle cannot pass, or at least marks (such as bundles of grass tied on to stakes driven into the ground) should be put up to warn graziers of the prohibited places[3].

The forest-owner is bound to provide a proper way for the cattle[4] to get to the open parts of the forest, and should take the precaution of fencing or otherwise keeping the cattle from wandering off the way provided[5].

If the owner does not fence, the cattle-owners will not be responsible for trespass, unless it can be shown that they were guilty

[1] *Eding.*, p 92.

[2] So in the Austrian law, and in Prussia (Rönne, p. 717, &c.), cattle bells are also required, and herdsmen must keep together; so in the Bavarian law of 1852, section 43, and the French Code, Forest, Art. 72. Art. 73 requires cattle to be marked with a special mark for each commune or right-holder, and Art. 75 requires the use of cattle bells.

[3] See Grabner, as to this provision of the Austrian law.

[4] Saxon Mandat, § 11, and Roth, § 271.

[5] The French law (Art. 71) requires the route to be fixed, and, if need be, fenced or ditched at the joint expense of the forest-owner and the right-holder. We could hardly apply this rule in India, unless, indeed, under special circumstances, the Forest Settlement Officer saw fit to lay it down as a condition of recognizing a right of grazing.

of negligence. This is expressly provided in the Hazára Forest Regulation II of 1879. The routes prescribed for access to the grazing portions must be reasonably convenient; but the cattle-owners cannot complain merely of having to make a circuit, or go round a little, to avoid the closed places[6].

Lastly, I may remark that the erection of sheds or huts in a forest is generally prohibited; but the Hazára Regulation contains a reasonable provision that graziers admitted to a forest may temporarily put up such sheds as may be required for the purpose of shelter during the grazing season. The construction of such sheds must not, however, be made an excuse for cutting young trees, or lopping boughs without permission, as fires are often lighted in these sheds, sometimes for the grazier's use, sometimes to produce smoke which keeps flies, &c., from the cattle: precautions will have to be taken that the forest is not burnt.

In Europe, cattle usually leave the forest at night, and I observe that the Bavarian law[7] expressly prohibits grazing at night, *i.e.*, between sunset and sunrise. This provision cannot be generally adopted in India, at least not in hill forests, but it should certainly in plantations in the plains.

B.—Grass-cutting.

§ 18.—*Its advantages.*

In India this is often regarded as a conveniently allowed substitute when grazing has to be excluded. Cutting grass with a sickle or plucking with the hand may often be allowed when cattle grazing would do harm.

I am not aware of any case in which this practice has been claimed as a right, unless it be in the case of grass used for thatching or for some industrial purpose, such as '*múnj*' (*saccharum*) for ropes, or scented grasses taken for making hot-weather door-screens.

Grass-cutting is not entirely free from danger. Though a careful cutter can avoid touching tender seedlings or new coppice

[6] See Grabner, Austrian forest law, § 10.

[7] Of 1852, Art. 43.

shoots, he rarely does so. Moreover, in some cases, removal of the grass and herbage uncovers the soil and takes away protection from seedlings.

The removal of thatch grass and other tall and coarse species is always an advantage.

Speaking, however, of ordinary grass-cutting, it should be excluded from portions of forest where seedling growth is expected or has recently begun, and the same in compartments beginning to coppice[8].

The Saxon law[9] protects against grass-cutting or plucking—

Simple coppice,	till	5th year.
Stored „	„	7th „
High forest	„	11th „

Eding[10] gives nearly the same periods. The object of giving the stored coppice two years more growth appears to be that the best stems, which are likely to be kept as the "stores" or standards among the coppice, may get a good start.

In Europe, the necessary caution is added that *scythes* are never to be used.

It is convenient to require that the grass be cut on certain days when a forest officer can be present to supervise, if any risk is apprehended.

It is generally not needed to enquire as to the number of cattle for which grass is cut, but, if need be, to fix a number of bundles, head-loads or pony-loads that may be taken.

The remarks made under the last head (grazing) as regards *season* apply also to this.

[8] And of course, in all places taken up for reboisement work. Here, the first thing to do is to cover the ground with *something*, and every form of removal of herbage has to be strictly interdicted for a term of years. In dealing with such places, if hardship is caused to villages in the neighbourhood, one of the first steps is to select suitable plots on which to sow hardy and quick-growing fodder plants, or even grass.

[9] Mandat, 1813, § 31 (Qvenzel, p. 206).

[10] Eding, p. 94, where the author also alludes to some old laws of the 17th century, which fixed an age of 8 years uniformly for all forests.

C.—Lopping for fodder, "Rab" and leaf-gathering.

§ 19.—*Species lopped.*

This practice is especially common in the Himalayan forests, both for litter and for fodder. At lower elevations, *Grewia*, the wild olive, *Pistacia integerrima*, and at higher elevations, oaks, elms, mulberry (*Morus serrata*) and maples, are lopped for fodder; deodar and pines are cut for litter; the leaves are afterwards used for manure, and the woody parts are burned for fuel.

In Bombay and South India lopping of trees, and bamboos, is extensively practised for what is called "ráb cultivation;" weeds and brushwood, or else boughs of trees or bamboos, are dried and burned, and the ashes, mixed with manure, are dug into the soil. This practice is looked on as essential to rice cultivation[1].

There is no doubt that in the Himalaya, what with the poverty of the cereal cultivation, and the absence of fodder crops or natural herbage that can be dried and stored for winter use, the lopping of trees for fodder becomes simply indispensable to the villagers. To some extent it must be allowed: but in all cases, I may take it for granted that no trees of valuable kinds will be allowed to be

[1] In some places it is held (as in the Bombay Presidency) that this ráb is not a right but only a license. This does not indeed make any great difference as long as it is determined to allow the practice; but as it is no doubt one of the greatest obstacles to forest conservancy in this part of India, the recognition of the fact that there is no such *right*, may be valuable in enabling this practice in time, to be stopped. There is little doubt that at present, such a plan is really necessary; but it is so in the sense that a manure such as wood and leaf-ash is needed, and that an efficient and cheap substitute has not yet come into vogue

Ráb, where allowed at all, is variously regulated in Bombay. In some places (for instance, in the Mahableshwar Five-mile Reserve) people are only allowed to cut six kinds of *annually growing* vegetation in the forest. In Kolâba and elsewhere, they are allowed to cut all herbage and to lop 23 kinds of trees. In Thána, all trees but 18 reserved kinds, may be lopped. It is now intended to regulate ráb cutting by opening and closing blocks in rotation. In some places (as in the Konkan) the fields themselves are manured with dry fish, or by folding sheep during the winter on the land, but the nurseries in which the young rice plants are reared are manured with ráb. First, a layer of dung is put on the beds, then grass and bushes, then some pulverized earth, and grass over all. This is buried and dug into the ground. It is, however, found in the Conservation of the North Division, quite sufficient that herbage, not trees, should be cut.

cut in this way. For example, belts of oak in or outside the deodar forests may be assigned to this right, and all injury to the deodar itself be prohibited[2].

I have not yet met with any instance where lopping has been regulated to any specified quantity.

Two measures, however, are possible; first, it may be required that the trees may not be lopped beyond a certain height up the stem, or that a certain proportion of branches be left; next (which is even more important) that the trees may only be lopped at intervals, a season for rest and recovery being allowed. It may also be possible, as has recently been proposed in Bombay, to plant belts of umbrageous and very quickly growing trees on purpose to supply branches for lopping.

In the Austrian law it is provided[3] that only two-thirds of the whole stem length may be lopped at all, and then only one-third of the stronger branches removed, weak ones being left.

This is too elaborate for hill villages in India: it would be possible, however, to confine lopping to a certain height up the stem, or even to require a certain number of branches to be left uncut.

§ 20.—*Rotation.*

It must always be arranged that the trees should get one year's, and if possible two years' rest after lopping. In villages where trees are abundant, it will be often found that it is the native custom to allow a rotation of this sort.

§ 21.—*Season.*

The lopping also must be only at a proper season: it should be *after* the full year's growth has been attained: and it usually is so

[2] I do not allude to cases where isolated deodars overhanging fields are lopped to prevent the effect of their shade, nor to cases where one kind of tree is lopped in the forest to favour a more valuable kind. Thus, in mixed forest, where it is not easy to afford to cut out *Pinus excelsa* which oppresses deodar, it is possible to let villagers *lop* it, which they will often be glad to do.

[3] Art. 12. It is to be confined, as far as possible, to forest compartments about to be felled. The French Code only alludes to lopping (Art. 150) in strips at the edge of the forest (*lisière*), and where it is a question of over shadowing crops and preventing their growth.

by custom, because then the rains are over and they begin to store the boughs for winter use.

If in any case it is permitted to lop trees of one kind scattered through a forest of other kinds which are not to be touched, the lopping ought to be done on fixed days, so that it may be done under supervision.

It will be observed that most of these restrictions are virtually in the interest of the villages themselves. Any excess or abuse in lopping will kill the trees in a very short time. If then the villages are to be kept provided with fodder without either devastating an immense area of country or coming at last to destroy valuable trees because none other are left, the practice *must* be kept within bounds.

§ 22.—*Continental law on the subjects.*

With the exception of the Austrian law alluded to, the continental text-books do not acknowledge such a right. Eding mentions a right to pick leaves off with the hand. This right of course never extends to the use of any cutting instrument whatever. Seedlings may not be touched, but only the side twigs and branches of well-grown trees[4].

§ 23.—*Leaf gathering in India.*

Besides lopping for the purposes indicated, the rights which come under this head, in India, are few. In Burma leaves of *Careya* and other species are gathered for wrapping cigarettes in the Burma fashion. In the Panjáb, and elsewhere, leaves of *Butea frondosa* and of *Bauhinia Vahlii* are used for making plates, cups and even covers for the floors or table on which the food dishes are set. The leaves are sewn together (sometimes in elaborate patterns) with little splints of grass or straw. Umbrellas made of leaves fixed on a bamboo frame are also common in some places. Other instances

[4] See also Pfeil, p. 50, § 12. He remarks that this right may sometimes prove useful by helping poor people to maintain a couple of goats or sheep, which is, a great thing for them. The right, carefully exercised, does no harm, if the leaves are taken when growth is over or before the leaves begin to turn to fall.

will probably occur to the reader from different parts of India. In parts of the Hushyárpur Siválik Hills, I found *Butea* leaves gathered for manure. In some parts, turmeric fields are covered with leaves (sâl and other) to shade the ground. In the Melghát forests of Berar, the large teak leaves are largely gathered and exported in quantities (especially the very large leaves off young saplings). The leaves are used to form the inner lining for roofs of native houses[5], a layer being placed below the grass, &c., which forms the flat roof over the rafters or bamboos. Leaves of *Butea* and *B. Vahlii* are also so used. In Berar, the teak leaf gathering is apparently enjoyed as a right. The exercise of rights of this kind do not give rise to any practical difficulty.

D.—Wood Rights.

Rights to wood will be found to consist either of rights to—

building timber or wood,
firewood,
small wood for implements and industries,
dead and fallen wood,
stumps.

Catechu-boiling may be regarded as a wood-right, because of the trees cut; but this I deal with separately.

§ 24.—*Building wood.*

The practice of cutting trees has been at all times restricted to some extent by the ruling power. Indeed, the only measure of forest conservancy that was ever taken in former days was to declare certain valuable kinds of trees (wherever found) to be "Royal" trees[6]. This is probably more for the sake of revenue than from any care for the trees themselves, and may therefore be classed with

[5] In 1879-80, as many as 9,188 bundles of 500 leaves each were exported.

[6] In Burma teak trees are Royal trees. In other parts, the Government has generally reserved sandal, blackwood, "poon," and other species. In the Himalaya deodar has usually been considered a Royal tree in British times, and perhaps was so in some of the Hill States under native rule.

other arrangements under Native rule for taxing forest produce. But it had the effect of preserving the growth, and preventing the usual license in the matter of forest produce generally, extending to such trees and growing into a right.

Rights to trees for repairs and building of houses, temples, &c., rarely or never extend to trees locally understood to be "reserved," unless there has been some express order or grant on the subject; and then it will be found that inferior trees are to be had free, but superior ones on a certain payment.

I do not know of any instance where there has been any doubt whether a right was for *building* wood or for firewood[7]. In the vast majority of cases at any rate, this right, when claimed in India, will be found to be a "real servitude" for the beneficial enjoyment of some house or building. A man can hardly have a right to "building wood," unless he has a house or something to keep in repair or rebuild.

I do not say it is impossible that a person should have a right to a certain number of poles, or something of the kind which might amount to a 'personal' right to building wood; but the first-named right is far more common.

As to the *purposes* for which building wood can be claimed, it is evident that it is for the repair, and perhaps entire rebuilding, or existing buildings, bridges, &c., but it could not be claimed for erecting new buildings in addition to what were on the ground before[8].

But sheds and "accessory buildings" necessary for the right-holder's business or occupation, are included[9].

[7] I mention this because in France if a right as to "wood" generally, that is held to mean "firewood" on the principle of the least burden to the estate (Meaume, page 243, § 184). But this is not admitted in Germany (Roth, § 280), and certainly would not be in India: we should enquire what was really wanted and record the right accordingly.

[8] Meaume, § 214; Roth, § 282. So Hartig (Rönne, p. 734), and in the Saxon Mandat, §§ 19, 20.

[9] What Meaume conveniently calls "*bâtiments d'exploitation*" (Vol. I, § 221).

The buildings must be maintained or rebuilt as they were before, and a right-holder could not demand a large quantity of wood (for example) to rebuild entirely in wood a house which had previously been built of stone.

Nor, in India, could a man, whose right was to so many poles for a village house in the native fashion, claim squared beams, or timber to make them, when he became rich enough to wish for a larger and better house. Nor, for example, could an European, becoming entitled to a *zamindár's* right to wood, claim free wood to build a house on the European style; his right (supposing such a right possible) would only extend to such wood as a native zamindár could have claimed.

Regard must be had to the custom and style of building in the locality[10].

As to *quantity*, the above considerations will, to some extent, serve to limit it. It is rarely, at present, convenient to fix an exact number of trees to be cut in a year, or a precise number of cubic feet to be claimed by each right-holder. Perhaps, in the case of *poles* of sál or other species for native house-building, it may be possible to do so.

[10] Meaume (I) § 213. I have here to notice a very important point connected with rights to building wood in the North-Western Himalaya. The right has obviously to be exercised without waste, and in such a way as, while the householder gets *sufficient* to do his work, he does not make a heavier demand on the forest stock than need be. Now, in some places, the people are in the habit of squaring timber with an adze, or axe, and consequently making one beam out of a tree that would, if sawn up, yield two or more. There is no excuse for such waste, when the people can be provided with saw sand can use them, if they chose to overcome their apathy. This should be made as easy as possible, by loan of saws, and having them for use at certain convenient places; and it might in due time be insisted on as a condition, that wood should be sawn up; the quantity of wood granted should be such as will amply suffice, *if* saws are used. There are no means in Eastern countries of introducing an economy of this kind but by a little pressure at first. In a district like Kulu, where more than 20,000 trees are given annually to right-holders free, it makes an enormous difference to the limited area of forest whether these 20,000 trees are really necessary, or whether one-half the material is not wasted by being chipped away with an axe; if that is so, 10,000 trees with the use of the saw would suffice to produce the same results as regards building and repairs *as the* 20,000.

It may, however, be very convenient to fix a quantity in this way: supposing that a village or a number of villages had a right to building wood for a number of houses (which the Forest Settlement Officer would ascertain), it might be the most easy way to say, that a certain number of trees of a certain kind can and will be cut, or marked for cutting, annually in the forest, and that this wood will be distributed among the right-holders. Those persons who did not want wood would either store it up against they did want it, or would arrange the matter among themselves.

It is hardly necessary to remark that wood granted under a right of this kind must always be applied to the repairs and building, and can never be sold[1].

§ 25.—*Method of supply.*

The next thing is to settle how the material is to be supplied.

When such an arrangement as above indicated is not carried out, it will generally be provided that a given number of houses are entitled to wood of a certain kind and size as circumstances require, and that they will get it on application to a forest officer. The forest officer will issue a written "permit," specifying the kind of tree, size, or girth, number, or other particulars, and the time within which the material must be taken out of the forest.

The forest officer will, of course, grant as much as is really necessary on the best (but liberal) estimate he can make for the work in hand, and will refuse a permit for unnecessary quantities, or for valuable wood to be used for purposes for which inferior kinds would do as well[2].

Permits are usually issued as occasion requires; or, in places where the forest officer is not always on the spot, it may be a rule or custom that applications are made and acceded to at certain

[1] So in the European laws. Meaume, § 419, Cod. For., Art. 83. Roth, § 280 (*b*), and Eding, p. 115.

[2] In France (see Art. 123 of the Ordinance for the execution of the Forest Code), right-holders to timber must get a proper indent or estimate made out of the kind and quantity of wood necessary for the repairs or building in hand.

seasons. In Germany, it is a rule that only one year's supply can be asked for at a time.

There are, however, circumstances under which it may be desirable, in case of calamity to the forest, to require the right-holders to take and store up, perhaps for several years in advance, their quota of timber.

A severe storm may have caused the fall of a large number of trees, or an attack of caterpillars may have rendered it necessary to fell a large number at one time[3], or a fire may have killed a number of trees. Here it may be necessary to dispose of a large number of trees at once, and the forest may not be in a condition to yield any more for a long period.

And generally, it is understood that rights *can only be complied with within the limits of the proper yield of the forest.*

Right-holders may always be required to save the forest by utilizing trees standing dead or dying[4].

The French law never allows the right-holder to cut and take his own timber; he always takes it on a "délivrance," or formal authorization by the forest officer[5].

[3] See Roth, § 288.

[4] Roth, § 288; but I do not mean that a general right to take trees standing dead (of a size fit for building purposes) should be conceded. I have seen cases where a custom of this kind had sprung up, and of course people killed trees on purpose: and this offence can rarely be detected. Such trees are called in France "bois charmés" (see Meaume, § 199). The only case in which I have met with such a right is in the Panjáb hills is where a temple-keeper is conceded a right to take stems that die or fall by storm, snow, &c., for the repairs of the temple. I suspect even then the fall is often aided. In Burma trees "charmé" are called natthát (killed by the "nats" or fairies), and those blown down are "aulay": I never heard of a right to take these, unless specially permitted in fulfilment of a general timber right.

[5] Code For., Art. 79. This rule seems to have been a very ancient one, at least in one form or another. Mention is made of it in an ordinance of Philip the Bold (A. D. 1280).

No one to whom a "délivrance" is refused improperly can go and take the wood himself, not even with an order of Court; only *damages* could be given against the forest-owner wrongfully refusing a "délivrance." (Meaume, § 362.)

In France this applies to all wood-rights, so that I shall here dispose of the subject and not recur to it under the head of fire-wood subsequently dealt with.

The *délivrance* varies according to the nature of the wood. It may be an actual making over of so many beams, or so many cubic feet in log for building, out of timber cut already by the Forest Department, or it may be that the forest officer marks certain trees and authorizes the right-holder to cut and remove them. If the *délivrance* is of dead and fallen wood, it would simply be an order clearly defining where the wood may be picked up, and on what days, &c.[6]

The material must always be removed in a fixed time, or else the forest would be burdened with logs and pieces lying about for an indefinite time, and there would be great opportunity for trespass, theft, &c.[7]

If necessary, it is required that material be removed by a certain route, so as to avoid injuring the forest growth.

Damage to the forest growth by negligence in extracting material, is a punishable offence.

The German law has similar provisions[8]. There must be an assignment of the wood and of the place where it is to be cut (*anweisung*). The Austrian law gives full details[9]. The right-holder can only take marked trees, and in the place pointed out, or else he must be very clearly informed what he may do. The forest-owner may also require that the right-holder shall put a mark on his timber,

[6] Meaume, § 365, &c. There is some doubt as to whether a délivrance must be in writing: in Art. 79 of the Code mention of writing is omitted. Meaume thinks that this was an accident; nevertheless, under Art. 79 as it stands, a verbal order would be sufficient.

[7] Roth, § 280 (*b*). So in France, Code For., Art. 83, and Meaume, § 419. Eding p. 115.

[8] See Roth, § 280 (*c*); but some of the laws are not clear as to whether the wood is to be cut and removed by the right-holders after it has been assigned to them. See Eding, p. 108 (VI A.)

[9] Articles 15—24.

and submit to have his loads examined as they pass out of the forest. A time for removal is fixed[10].

In India some of these points are also applicable as clearly necessary for the safety of the forest.

The number of houses and right-holders being known, it should be provided at settlement, that trees of the size required will be marked and made over to the right-holder to be cut in the part of the forest indicated.

Some of the European text-books discuss some further questions which need not, in our present stage of progress in India, be gone into. For example, whether, if the stock in the forest is so diminished that the right-holders can no longer get what is due to them, it should be held that the forest-owner is liable to make compensation; it is argued that it may be so if the diminution is due to his wasteful or negligent working, but not otherwise. Another point is the liability to supply timber where a house is burnt down and compensation has been given by an insurance office for the loss[1]. These matters have no practical importance, at present, in India.

§ 26.—*Firewood.*

This right is spoken of in the English law-books as the right of "common of estovers," or "fire bote" (*affouage* of French law).

In Europe, where all material from a forest has a value, and can be utilized, distinction is drawn between twigs and branches taken to form faggots,—firewood from stems of a size that only require to be cut to lengths but not further split,—wood that requires to be split into two or into four,—firewood from dead branches or trees, from refuse of fellings, from wood broken off by storms, &c.[2]

In India, it will be sufficient to include all in one head, for generally it will be found that rights to firewood originated mostly

[10] Austrian law (Art. 17). In Prussia two months are allowed for removal (Rönne, quoting Ordnung of 1851, § 30).

[1] See Eding, pp. 115, 116, &c., on some of these points.

[2] In France small stuff tied into bundles is called *bois de corde*: wood that does not need splitting only cutting to lengths, is *bois de rondin*; that which is split into two or four, *bois de fente, bois de quartier*, &c.

in the practice of going to the nearest wood and bringing in what was fit to burn, and what was got with the least trouble.

Consequently, it is always fair, in regulating a firewood right, to require people to take dry wood of any kind that can be found in the shape of branches knocked off by snow or storm, and lying on the ground; dead stems and dead branches which may be broken off with the hand; in short, any waste and inferior stuff which is sufficient for the purpose; and not to cut any living tree, when the former suffices.

On the same principle, where there is not dead wood, it should be ordered that inferior trees must be utilized, in preference to hard wood and valuable kinds, even if the latter are not certain to attain any good size.

The "inferior kinds" spoken of must be of course fit for fuel. It would be hard to ask a man to take his entire load of *Grewia oppositifolia* (dhâman) in some of our lower hills, or of *Salvadora* in the Panjáb plains: but he must be expected to take a proportion. And so as regards size: a man cannot be asked to take his whole supply in small stuff: he must, however, take a fair share, and cannot ask to have the whole in solid pieces[3].

The *purpose* also should be looked to. For example, thorny brushwood and *Adhatoda vasica* will do well for ovens and for lime kilns and for such purposes; solid fuel, such as one would use for a railway engine, should not be given.

A right to cut *timber* trees in any stage of growth for fuel cannot be admitted[4]. What, in any given locality, are timber trees likely to grow to full size for building, for sleepers, and such like, is a question of fact very easily determined. Of course some trees may give timber and yet not be very valuable, or some

Roth, § 281.

See Meaume (end of § 198, Vol. I, page 259). The only exception is where the forest-owner has chosen to convert a coppice forest into high forest, and so only has timber trees and must provide for the right with them (§ 211, p. 279). In England good timber can only be demanded in default of any other means of supplying the right.—(*Cooke, pp. 35—37*).

trees may grow to a size which is neither the one nor the other. But in practice there is no difficulty in laying down a sufficient distinction.

There has been no time in the history of India when the ruling power did not insist, or might not have insisted on, such a rule in the case of firewood rights.

The only exception is where there are badly-grown trees, or where there are thinnings, or where the wood cannot be otherwise utilized. In such cases it should be a matter of special concession.

So, too, I do not speak of special concessions in time of famine, or of particular places where there is wood which we do not know what to do with, and so forth.

As regards quantity, this right, more frequently than the last, admits of specification, if not of stacks or weight, at least of number of loads, &c., and where it is a case of cutting brushwood, of area to be cut over.

Where the right is supplied by picking dead and fallen wood, the only limitation imposed is that it has to be gathered over a given area of forest, in such parts as are indicated by the forest officer.

There may be cases where it is part of the right that the material be carried away and sold; here the quantity, number of loads, &c., to be taken ought certainly to be fixed, and this can usually be done by taking the average of past years: otherwise, a person holding such a right might go on increasing his sales till a really formidable demand was made on the firewood resources of the forest. Even if it is only fixed at a certain number of head-loads, bullock-loads or so, it is better than uncertainty.

More commonly the right is required so much for each house in a village: in that case the houses are counted and the number of hearths and their requirements estimated[5].

[5] I shall afterwards, when speaking on section 23, which prohibits the growth of new rights, dispose of the question which may arise in all cases dependent on the *number of residents* in a village, as to whether new houses and new comers to the village are entitled to the same right as those in existence at the time of settlement.

It is a question of fact whether firewood can be required not only for the hearths of the residences but also for workshops belonging to the village[6].

As regards the time at which firewood may be got in, a supply for a long period in advance cannot usually be demanded. In Germany, wood for one year only is given at one time[7]. In India, convenience will be considered, and this matter may need regulation according to circumstances: but ordinarily, a man is allowed by permit to go and cut from time to time whenever he wants wood, provided he does not exceed his total yearly quantity, or does not exhaust the area set apart for cutting; that is his own affair, and if he too quickly uses up the supply he must go without[8].

I should here remark that it is rarely or never necessary to impose any restriction on the mere gathering or picking up of small wood, dead boughs, &c.

The material is never valuable: it is a boon to the poor people in the neighbourhood, and to prohibit its use only encourages theft[9].

People who take dead wood may even break off dead branches that they can reach: but they must never use irons or devices for climbing, nor any kind of cutting instrument[10].

[6] See Eding, p. 117. Sheds and outhouses requiring fuel are considered as part of the house. If a man enlarges his house and creates a number of new hearths, he can only, in Germany, get wood under his right for the original hearths. (Roth, 28 (*b*)).

[7] Eding (bottom of page 117).

[8] In France, by Art. 81 of the Code For., in collecting the supply of firewood, some person is employed to cut the area completely and distribute the produce. This cutting is done at once, as the "*coupes*" are regulated into such size as may make this convenient. In time some such arrangement will become necessary in our own forests. See also Code (Art. 105), and the Ordinance for executing the forest law (Art. 122) as to the practice in supplying firewood rights.

[9] So vonBerg, p. 129, Rönne, p. 740. By the Saxon Mandat of 1813, § 27, poor people are expressly allowed to take dry wood lying about; and so in Prussia (Eding, p. 119), but such wood must never be sold—it is only a concession for personal wants.

[10] So in Code For., Art 80, and Eding, p. 119.

Under this right, large trees, standing dead or fallen, are not included, and may not be touched, unless, indeed, they are old rotten stems lying useless in the forest, which are chipped away and taken piecemeal. ("*Urholz*" of the German books).

§ 27.—*Right to wood for implements and industries.*

These rights are generally the same as other wood-rights, except that they are generally on a smaller scale.

Bamboos are the only product demanded in large quantities, and it is easy to regulate the supply in this case.

The villages will either be allowed certain *tracts* from which they may cut bamboos, the production being the limit (and there is not much danger of their exceeding that, for the people as a rule understand the nature and growth of bamboos sufficiently), or else they will be allowed a certain *number*.

Other rights under this head, generally, require only small pieces of wood, and that in no very large quantity[1]. But here, of course, the wood required is of a definite species. The comb-maker requires box or olive wood; for the shuttle of a loom a bit of hard *Acacia catechu* or other dense heavy wood is necessary, and so forth. The right-holder could not be required to use dead wood for his plough, or a pine tree for the pestle of his oil-mill.

On the other hand, people cannot claim any wasteful exercise of their right, as *e.g.*, cutting down saplings of valuable trees to make fencing (unless, indeed, there are forest *thinnings* available, which are not otherwise utilizable).

[1] The only exception that I know of is where large pieces are required to make the large pestles and mortars used for pressing oil for sugar-cane in some parts. The receptacle is made out of a solid stump, and the pestle is a thick piece of some hard heavy wood.

In Burma I saw a very wasteful process of making cart-wheels, which consisted in cutting down a tree ("padouk" I think) of sufficient girth that a section across the lower part would, when dressed a little, give a solid disc for a cart-wheel: two pairs of these thick discs (possibly more than one pair) would be cut out of the lowest and broadest part of the stem, the rest of which would be abandoned. The wheels, it is true, fetch Rs. 30 and even more a pair, but that does not excuse the waste. No one, however, would recognize a *right* to have wood for wasting in this fashion.

Usually such rights will be exercised by the right-holder getting a written order or permit, which will specify where the wood is to be got, and how many pieces. In settling such rights, the amount of wood required will rarely be such as to necessitate any specific fixing of quantity.

Under this head I do not include manufactures like canoe-making or boat-building in Burma, where whole trees, and those of a large size, are required. Here, if there is a right to be supplied with timber for such purposes, it is counted as a timber-right, and it must be strictly determined (as indeed it easily can) what number and kind of trees may be taken in a year for that purpose. I believe, however, that *rights* to timber for this purpose will be rare, if even they exist.

§ 28.—*Stumps of trees, &c.*

It is not often in India that villagers are able, or willing, to extract the stumps of felled trees and utilize them for fuel. The labour and cost of extraction is too great.

There is, however, a use to which stumps of resinous pines and deodar are put in the North-West Himalaya. They are utilized for "jugni," or splitting off pieces for torches[2].

There is of course no objection to this practice. And a stump often lasts a long time; for the contractors of former days, when they worked the forest, invariably felled the trees high above the ground, leaving stumps 5, 6 and even 8 feet high.

If, in any case, the extraction of stumps is conceded as a right, the people should be required to fill up the holes[3]; and the practice must be stopped where there is a seedling growth[4].

Of course no such right would be recognized in a coppice forest, where the stools were capable of sending up shoots.

[2] See also under (F), Rights to Produce (Resin).

[3] If this is desirable. In cutting *Prosopis spicigera* for coppice, it is an advantage to have the hole, caused by taking out a large part of the root stock below the surface, left as it is: it promotes the sending up of shoots and allows the scanty rainfall to accumulate, and the ground to be loose and moist.

[4] See Eding, p. 123 (F), and the Saxon Mandat of 1813, § 10.

E.—Right to Decayed Leaves from the ground.

We have no special term to indicate this right. In German it is a right to "*Waldstreu*" (*streunutzung*). In French it is called "*Droit de soutrage*[5]."

The right occupies a prominent place in the German text-books, but in Meaume and other French works, it is scarcely alluded to. The right is, however, found in French forests. By the ordinary law, the removal of dead leaves is, in the absence of a right, an offence, and is so declared in Art. 144 of the Code Forestier. Where there is a right, it is to be remembered that the exercise is subject to the same restrictions as any other right. It can never be exercised except on the usual condition of a previous "délivrance," *i.e.*, that the Forest Officer should assign and precisely indicate the place where the right can alone be exercised. In the same way it is a general rule that rights can only be exercised "suivant l'état et la possibilité des forêts," so that the Forest Officer will not give a direction for the exercise of the right in any part of the forest in which there is danger to the soil or the forest growth. In this way all the principles, which are fully set out in the German text books, can be legally applied, and probably would be in all forests where it was necessary.

The German text books sometimes include under the term "streunutzung," not only the collection of dead leaves, but also the removal of moss and even herbage such as heather and broom (*genista*)[6].

In India, however, the right that we have to deal with consists in taking up not only the freshly-fallen dead leaves, but also those

[5] In Gerschel's Vocabulary of French and German terms (for use at Nancy), no French equivalent is given: *droit de fane* means only scraping up dead and decayed leaves: whereas *streunutzung* is often employed to indicate the collection of moss, litter, &c., as well: *Soutrage* means anything spread out on the surface, and is applied often to cutting broom, heather, moss, furze and undergrowth, but also to taking dead leaves.

[6] For example, Hartig, as quoted by Rönne, p. 721; and see Austrian Law of 1852, § 12.

decayed and turning into humus. It is chiefly, as far as I am aware, exercised in deodar and other coniferous forests.

§ 29.—*Destructiveness of the right.*

It is needless to remark that such a right is one of the most destructive of all rights.

"An excessive removal," says Grabner[7], "carried on for a series of years, must result in deterioration of the soil, lessening of the wood-production (leading to the growth of poor, stunted and slow-growing trees), and at last causing distorted growth, diseases, and even the dying-off of whole groups of trees, till with the disappearance of the trees the right itself perishes. If the right is a matter of urgent necessity to the right-holder, he is thus placed in a critical position." To this I may add that the exercise of such a right exposes the roots of trees to the action of frost; it dries the soil and makes it less retentive of moisture; exposes it to the action of weather and hinders the process by which the raw mineral material of the upper subsoil is dissolved and made fit for absorption by the root-fibres to nourish the tree.

In scraping up the surface also, innumerable seeds just sprouting, are taken up, and when a new supply of seed falls, the ground is hard, and there is no *nidus* for the germination to take place in[8].

Unfortunately, however, the right is often very much wanted, especially in countries like Kulu in the Himalaya, where other manure is almost unprocurable. It may then be necessary to allow its exercise, but in all cases under the strictest regulation: for it must be borne in mind that if unregulated there is no right

[7] Page 263.

[8] See Hartig, quoted by Rönne at p. 721. A forest, he says, may barely survive but can never yield as much as it would if the right did not exist: it is therefore worth the forest-owner's while to make great sacrifices in order to get rid of the right. Eding (p. 132) says: "This is the worst of all forest rights" (*schädligsten von allen ald servituten*; so Pfeil, § 13, p. 51; but the authorities are endless. There is a little treatise by Karl Fischbach (Die Beseitigung der waldstreunutzung, &c., Frankfort, A. M. 1864) devoted to a study of this right. In this may be seen the calculations made by Hundeshagen and others of the effects of removing certain weights of the "streu," on the forest yield.

which will more surely put an end to the forest altogether in the course of some years.

In places where the forest area is split up into small blocks separated by private lands, it will be convenient to assign some of them for the supply of dead leaves; but even then the same block cannot be continuously worked.

§ 30.—*Principles of regulation.—When the right* must *be excluded.*

The following principles of regulation with regard to this right are supported by an entire consensus of German authorities.

In the first place the right cannot be exercised—

(1) on very steep slopes;

(2) in parts of the forest where the soil is stony and poor;

(3) in parts of the forest subjected to processes of regeneration and restoration;

(4) in parts of the forest to be cut down in the next four years or so;

(5) in parts under young growth.

As regards this last, the law of some German States prescribes that the right cannot be exercised until the forest is 60 years old for high forest, and 15 years for coppice[9].

The law in Baden (of which, von Berg says, the terms are too short) fixes 40 years for deciduous high forest, 30 years for pines, 15 years for hard wood coppice and 12 years for soft wood[10].

[9] In Prussia, apparently, no fixed age is given; professional opinion is to determine whether any given portion of a forest is fit or not to bear the exercise. Power is reserved to the right-holder to obtain a legal settlement, if he thinks the forest-owner does not open a sufficient area. (See Eding, p. 103.)

[10] The authorities are all concurrent on the subject of those restrictions which are universally applicable. (See Rönne, quoting Hartig, pp. 721-46; von Berg, p., 231; the Austrian Forstgesetz, §§ 11-14.) Art. 13 of the last quoted provides that lopping of trees and collecting dead leaves can never go on together on the same area. The Prussian special law of 5th March 1843 is fully described by Eding (p. 102, &c.). This law requires *tickets* to be issued, which must be produced whenever the right is exercised. The ticket specifies the amount of "streu" which may be taken, and the means by which it is to be carried away. The law also contains some excellent provisions for punishing wilful contraventions of the rules.

§ 31.—*Where the right is admitted.*

The parts of the forest that, not coming under the above exceptions, are open to the right, must be divided into blocks, so *that the right is exercised in rotation and never continuously on one spot.*

The division may conveniently be into four blocks, each to be worked for one year.

In the block open to working it is necessary to make the following provisions :—

(1) The season must be fixed. In Germany, it is from the 1st October to 1st April, because the dead leaves are then thicker on the ground, and there is the least risk of the *soil itself* being scraped up. In India local circumstances must be looked to.

(2) During the season the collection should be allowed on certain days in the week, and so be done *under the supervision* at least of the forest guards.

(3) The surface only must be taken, and black soil underneath must not be removed[1].

In Germany also, the *quantity* of stuff to be taken is fixed. In India this may be difficult, but it is of great importance and should be attempted, however roughly. I see no difficulty in making a beginning by settling that so many "kiltas" full (the Himalayan basket) or other such locally-known measure can be taken, and no more.

The plan of tickets or "permits" can also be followed : on this the season, the part of the forest, the days in the week and the number of basketfuls should be entered.

Lastly, in some places it may be found possible to make plantations with the express object of supplying this right and so relieving the rest of the forest.

[1] In Germany, this is secured by allowing only wooden rakes (not *iron* ones) with thick teeth, to be used. The Prussian law requires that the teeth should be at least 2½-inches apart.

F.—Rights to other Forest Produce.

In India, these are apparently more numerous than in Europe. Various flowers and fruits are collected for food, for dyeing or for medicine[2]. Bark is collected for tanning and for fibre. Wild honev and wax are gathered. In some cases, limestone, pebbles, laterite, gravel, and other substances, are collected from the surface or dug up.

The regulation of these, according to local circumstances, never presents any difficulty. The locality, the seasons of collecting, should be specified, and frequently the quantity can at least be roughly determined with reference to loads, &c.

§ 32.—*General Rules.*

It should here be generally remarked that however much there may be a right to collect such produce, there never can be a right to collect it in a wasteful way, or in a way that injures the property. You may collect honey, but you cannot (as I have seen done in Burma) cut down a large tree to enable you to get at the comb more easily[3].

Bark may be collected for tanning, but it can be only from trees about to be felled[4], not so as to kill valuable timber trees (unless, like oak bark, it can be best taken from young stems which can be reproduced by coppicing from the stool).

If in any case the bark is more valuable than the stem, and the tree is in fact grown for its bark, then we have a case where the tree is necessarily consumed, and we have to fix the number and size of the trees to be cut.

[2] In Bombay the myrobolans (fruits of *Terminalia Chebula* (hirda) and *belerica*, and in other parts also mohwa flowers (*Bassia lalifolia*), may be mentioned as familiar examples.

[3] And this is quite a different thing where the right in its nature involves the consumption of a thing, and consequently its destruction. If I have a right to certain pine timber, the trees cut are in one sense destroyed, but then it is the nature of trees to be felled when they are mature, and their reproduction is expected from seed. But if I have a right to firewood, where the stool may shoot up again and produce a fresh supply, here I am bound so to cut that the stool be not destroyed.

[4] See Roth, § 290.

If fibrous bark like that of the *Sterculia*[5] is taken for rope-making without killing the tree, then the right is regulated by prohibiting trees under a certain age or growth being touched; by prescribing that strips of a certain length and breadth and of a certain number only can be taken from each tree; and also that a certain period of rest and recovery is to be allowed to the trees.

The collection of surface products like gravel, limestone, pebbles, &c., must not be carried on in places where seedling growth is likely to be injured by it. Nor can kankar (lime nodules) be dug out of the ground, except on special condition of filling up the holes made, and not interfering with any areas under young growth or under special treatment.

§ 33.—*Manufacture in the forest: Lime—Surkhi—Charcoal, &c.*

Under this head, I must allude to certain practices, which perhaps rarely or never appear as *rights*, but which are nevertheless often demanded or require to be provided for. I allude to practices involving some process of *manufacture* in or near the forest.

For example, catechu boiling, burning lime or charcoal, and in some parts, burning what is called "surkhi" (a sort of clay or marl rubble, found on the surface, gathered in the forest and burned with the aid of brushwood collected in the forest: it is used for mixing with lime-mortar).

In these cases you have the produce of the forest,—chips of catechu wood, billets of wood, limestone, pebbles, &c., collected, and a further supply of brushwood, &c., is or may be required from the forest to carry out the burning or boiling.

It is conceivable that there may be such a thing as a right to have the materials, but not to endanger the forest by making the furnaces and lighting the fires within its limits.

In Burma, three species are so barked:
Shawbyú (*S. fœtida*).
Shawnee (*S. villosa*).
Shawwáh (*S. ornata*).

If it becomes necessary to arrange for such cases, the quantity of material should be fixed; but it must be provided that the process of manufacture is to be carried on outside the forest at such a distance as is safe with regard to danger from fire.

Limestone is sometimes found in the beds of dry "ráos" or streams intersecting the forest. The burning of lime in the bed may be admissible or not according to circumstances.

Where kilns for lime are of a certain customary size, it may be sufficient to fix the number.

Wood for charcoal burning is fixed by the number of stems or by a cubic measure (or even weight) of wood of specified kinds.

Catechu boilers, I believe, always use the twigs, chips, &c., of the tree to boil the pans, so that separate fuel is not required.

§ 34.—*Collection of Resin.*

Rights to tap or notch or bore trees for resin, wood-oil, or varnish may sometimes be claimed. Here again, as the trees are wanted to produce the material, year after year, the right must be exercised without killing the trees[6].

You cannot have a right to the practice of ringing a fine sâl tree to get a little resin (*rál* or *duná*) from it; and this practice, once so common in Bengal, has been put a stop to in all places where Government has the right of control. *Rights* do not appear to exist, however, in Bengal, to sâl resin—even to collect it in a reasonable way.

Resin rights may perhaps be claimed in the coniferous forests of the Himalaya.

It belongs to a work on forest utilization to describe the best processes of resin extraction[7]. Here I can only allude to some laws which illustrate the kind of regulation that has to be enforced in respect of this right.

Hartig says that the exercise of the right retards the growth of the trees, injures the quality of the wood and the production of

[6] See page 115, *ante*.

[7] See, for example, Gayer's Forstbenutzung.

good seed, causes the trees more easily to succumb to wind-storms and renders them liable to the attacks of insects.

The regulation of the right is, therefore, a matter of the first necessity. He recommends that the right should be confined to compartments going to be cut within the next 20 years; each tree is to be incised only in two places, and incisions to be made only once in three years for each tree. The resin collection should be stopped for the four years preceding the actual felling, so that the trees may have a little time to recover, and give a good crop of seed before they fall[8].

Eding says that strips of bark should be taken off 2 to 3 inches wide, and the resin scraped off twice in the year[9].

The Austrian rule is described by Grabner[10]. The tapping is confined to mature trees, and to places where the trees stand close together (chiefly, I presume, so that the trees which are rendered brittle by the process may be not so liable to windfall).

In spring the bark may be cut off in perpendicular strips, 3 feet to 4 feet long, cut to within 2 feet of the ground. The strips may be of such breadth that at least 4 inches to 5 inches may be left between them. Once in two years the resin that has exuded may be taken off, and then the strip is slightly widened by a cut on each side.

The Austrian pine (*P. austriaca* (*laricio*) *Schwarz föhre*) is cut by notches (*schrottung*), something the shape of a scallop shell from 3 to 6 inches, one in each tree, or two in large trees.

These principles, it will be remembered, do not relate to what is the best method of getting resin as a commercial product, or in cases of trees grown more or less expressly for resin production: they refer to what is necessary where the object is to manage the forest properly as a timber forest, and the right to take resin appears as a right of user burdening the forest.

[8] The Saxon Mandat of 1813, § 32, adopting this rule, fixes six years instead of four.

[9] Page 124. An ordinance of Wurtemburg adopts this also.

[10] Page 369.

§ 35.—*Torches.*

Under the head of resin rights, I may allude to the right to "jugni" found in parts of the Himalaya: it is a right to cut off resinous splinters, a bundle of which affords an effective torch. It is only cut from deodar and *Pinus excelsa*. *Pinus longifolia* wood would do as well, but I have not met with the right in localities where this species chiefly grows.

Usually this right is only claimed so as to utilize stumps (see *ante*, page 160).

It can never be claimed so as to destroy useful living timber trees. But usually there are in our forests 'torsos'—mutilated trunks, the result of the waste of former days.

These should be marked and entered in a register. The felling of these is then prohibited, and they are left, as long as they last, to provide "jugni."

§ 36.—*Varnish and Wood Oil.*

In Burma and other parts, the wood-oil of *Dipterocarpus* and the black varnish of *Melanorrhœa usitata*[1] is much in demand, and there may be rights to collect it. The illustrations given above, regarding the regulation of resin collecting, will indicate the nature of the restrictions to be enforced[2] in case these practices are claimed as rights.

[1] See Indian Forester, Vol. I, page 364, where an account of this industry is given.

[2] In Burma I understand the rules are, that Kanyin trees may not be tapped at all if under 6 feet girth, Eng trees if under 3 feet, and thitsi (*Melanorrhœa*) 2½ feet.

Kanyin trees are to have only the following number of notches according to girth:—

From 7½ ft. to 9 ft. girth	...	one notch,
„ 9 ft. to 10 ft. „	...	two notches,
Over 10 ft. ...	...	three notches,

in any one season.

G.—Hunting and Fishing.

I may allude to the subject here, though the Act does not take any direct notice of such rights[3].

In fact the circumstances of the country are not such that any legal rights have become fixed as they have in Europe. People, no doubt, have always in former days, gone about the jungle very much as they pleased, and hunted and fished: but the practice is not one which was habitually and necessarily exercised by certain villages in certain localities, like the grazing of cattle or the cutting of firewood. Hence no *right* is provided for or recognized.

It is quite sufficient, in our present stage, to leave the local Government to make such rules as may be necessary to regulate the matter, and infringements of the rules become punishable offences; (Indian Act, sections 25 (*i*) and 31 (*j*); Burma Act, sections 25 (*d*) and 37 (*f*).

These rules are usually framed so as to prevent trespass either generally in certain forests, or at certain seasons for fear of fire, or in certain portions of forests where plantations, seedling growth, &c., are in progress. Opportunity is usually taken also to protect the game itself, by close seasons, prohibiting driving in the snow, &c. Under these circumstances, it would serve no useful purpose to allude to the Continental and English laws[4].

H.—Temporary or Shifting Cultivation.

§ 37.—*The practice described.*

This practice will probably be well known to my readers. The

[3] The definition of forest produce includes tusks, horns and skins; but this is perhaps to provide for a case (if any) where the shed horns and tusks of animals are collected when found lying about in the forest. I never heard of a right to collect skins, horns, or tusks from living animals, for that, of course, would be a right to "hunting," but would, at the same time, be admissible to be claimed and settled as a right to 'forest produce' also.

[4] Where the subject, of course, is under special and detailed provisions. The edition of the Forest Code of France, which most foresters use, contains also the Code de la Chasse, Code de Louveterie (regarding wolf-hunting and noxious animals) and Code de Pêche fluviale.

For the German laws (Jagdpolizei Gesetzen), the reader will find a brief but excellent account in Eding. (Eding, 8th Abschnitt, p. 204.)

main question is, for a Manual of this kind, ought it to be admitted as a *right* at all?

The Burma law has, indeed, solved the question completely, and in that province, with its valuable and extensive teak-bearing forests, the question was one of the first importance; but in other provinces, the matter must still be dependent on reasoning derived from analogy and from general principles, although the decision of the Bombay High Court in the Kanára case has thrown some light on the subject.

Let me first describe the practice briefly. The following passage extracted from a note by Mr. Brandis, Inspector General of Forests, well describes it. The note relates to Burma; but making allowance for local differences as regards the season of cutting and burning, the size of the clearing, and the length of the period which elapses before the same spot is resorted to and cleared a second time, the extract sufficiently describes the practice as it exists in different parts of India:—

"In January or February, each head of a household cuts down the forest over an area of from 3 to 5 acres, burns the timber, bamboos, and brushwood when dry, sows the paddy in the ashes, and reaps it in autumn. In the following year he cuts down another plot of forest and treats it in the same manner. Dense masses of grass, herbs, bamboos, and coppice-shoots grow up on the plots which he has abandoned, and after a period, which ordinarily varies from 15 to 30 years, the forest has grown up sufficiently to be fit to be cut over a second time.

"This mode of cultivation is not peculiar to Burma: it is practised under the name of 'júm' in Bengal and Assam, is known as 'khíl' and 'koráli' in the North-West Himalaya, as 'bewar'[5] in the Central Provinces, and as 'kumri' [ponakad, takkal,] &c., in South India. It is, or was formerly, practised in several countries of Europe. As an instance, I may mention the hills of Styria, where it is known under the name of '*Brandwirthschaft.*' On these hills the forest is cut, the large timber is sold, and the tops, branches, and the small stuff are spread over the ground and burnt. The ground is hoed, and oats

[5] The term dahyá is commonly used also; but I am told that it expresses a different method of cultivation in which the plough is used. In Bengal "júm" is said to be rather an official than a vernacular term, each locality has its own name.

or rye are sown. Generally one crop only is taken; but sometimes rye is sown the first, and oats the second, year, after which the forest is permitted to grow up again. Under this system of cultivation, the fertilising effect of the ashes produces heavy crops; and as long as the wood was of little value on the hills of Styria, the system was very extensively practised. As, however, the price of wood increased, it was found more profitable to abandon this plan of cultivation, and to let high forest grow up on the ground.

"On the hills of the Pegu Yoma, where the most important teak forests are situated, the Karens, who are the chief toungya cutters in that part of the country, do not in all cases return to their old grounds when the forest on them has grown up sufficiently, but they frequently move to an adjoining valley or to another part of the country; though, as a rule, each tribe cuts its toungyas within certain limits, which, however, are wide and undefined. Here the population is scanty, and they have extensive areas to roam over, from which they choose the best places for their toungya clearings. Occasionally, they make plantations of the betel-vine, which climbs up the *Erythrina* tree, or they plant mango and jack trees, or they cultivate a few permanent paddy-fields in the forest, and in such gardens and fields they doubtless must be held to have acquired definite rights of occupancy. But the area of these gardens and fields is insignificant. On the vast forest area in which they cut their toungyas they leave no mark whatever of permanent occupation. There are extensive areas covered with secondary growth of trees and bamboos, which has sprung up on deserted toungyas, and here and there the sites of their former villages can be recognised by the half-burnt house-posts in the midst of dense jungle. But these stretches of secondary forest, which grows up on deserted toungyas, are separated by large areas of forest, which has either never been touched, or which has had time to grow up again into high forest.

"In many cases the Karens return to their old grounds, and in such cases their hamlets ('tays'), though they are shifted from place to place, according to the position of their toungya grounds, remain in one valley, or at least in one district. In other cases they move to greater distances and cut their toungyas in old forests. Sickness, quarrels, a visitation of rats, or an unfavourable omen are generally the causes for a move to more distant regions; but frequently they move without a definite cause, except perhaps a sudden fancy of their "tsokay" or headman. It will be understood that, under these circumstances, there is no trace of village areas; there is no attempt at protecting their toungya ground against fire, and no occupancy rights over definite plots of land, except in those rare cases in which they have permanent gardens or paddy-fields. In many other hill tracts of British Burma, the system of toungya cultivation is similar to that which is practised by the Karens on the hills of the Pegu Yoma."

One of the great troubles consequent on this practice is, that the fire from the clearings is allowed to spread in all directions, and mile after mile of forest is annually burnt. Teak and other valuable trees disappear under the process, and the hills subjected to such a treatment become either wholly barren, or clothed with poor stunted vegetation after a number of years. It is well known in Burma that teak has been virtually exterminated over large areas of country by this practice[6].

§ 38.—*Does it give rise to a right?*

Two questions naturally arise on this subject—

(1) Does the practice give any claim to an occupancy, 'landholder's,' or other proprietary right in the soil?

(2) If not, still, does it give rise to a right of *user*, a right (like a grazing right) to continue to use the Government forests for the purpose of temporary cultivation?

§ 39.—*Right to the Soil—Burma.*

As regards the first question, it must be answered in the negative. In Burma, it is expressly declared by the Land Act (II of 1876), that no such right arises. The ordinary form of proprietary right in Burma is not called by that name, but is spoken of as the right or the status of a "landholder," and this, by section 7, can be acquired by continuous occupation under given conditions for 12 years or more; but it is stated that this does not apply to cases in which section 22 of the Act applies. Now section 21 requires the Chief Commissioner to make rules for the practice of toungya, recognizing that this is a matter which needs practically to be dealt with; but section 22 goes on to say that *no right* arises from such a practice except such as the rules themselves expressly convey. No matter, therefore, that the practice has been carried on for years, perhaps for generations, and that a toungya tax has been paid, no right in the soil is established.

[6] See Kurz's Preliminary Report on the Burma Forest Flora, p. 72.

In parts of Burma (the hills between the Salween and Sittang), there is a curious instance of the complete occupation of land by Karen tribes, who, although they only practise toungya, still do so in a manner which leaves no question of real permanent occupation. The equities of such a case will of course be provided for in due time by the specific grant, or recognition of right pursuant to rules made, so that the law is satisfactory. There is, in short, no theoretical right, but Government can by rule grant one when it is right and proper.

§ 40.—*Other parts of India.*

In other parts of India, although the matter has not been declared by the legislature, the same conclusion must be arrived at. In the Kanára case, where the claim to right in the soil was based (among other things) on the fact of kumri cultivation, and the payment of a Government assessment or tax thereon, it was held that this did not amount to any *permanent adverse occupation of a defined area,* which is necessary to establish a right by prescription in the soil, and that the Government assessment was only a payment in the nature of a toll or tax on forest usages, such as under other laws Government imposes without in the least indicating that any right in the soil is recognized. It is quite unlike the case of regular land-revenue, where Government recognizes the person permitted to engage for the payment of the revenue as the proprietor of the soil[7].

§ 41.—*Right to the practice as a servitude.*

The second question is not so easy to answer.

In Burma, indeed, the Forest Act has supplemented the answer given by the Land Act, and declared that, as regards the further

[7] Kanára case (pp. 512-13), GREEN J. said: "The entry of kumri assessment . . . . . and its payment for a long series of years does not manifest any estate or permanent right in the forests," and again: "even if it should be considered that the plaintiff had established a right to have kumri carried on" (this is the second question which I shall examine presently) "such a right would not involve general ownership in the soil."

question of a right of user arising, there is none. The Act consequently speaks of the *practice* of toungya separately from forest *rights* which it regulates. It, of course, treats *toungya* as a practice which cannot summarily be stopped or harshly dealt with; it allows the Forest Settlement Officer to treat it with all the *practical consideration* that would be extended to a real right; but it saves the Government from the embarrassment that would be certain to arise in the future by creating any theoretical right. For it is quite certain that as forest land gets more limited in extent, and population presses, the areas now available for such cultivation will become largely restricted, and it is then a question how far nature herself will compel some modification of the custom, and how far the tribes will develop some other form of cultivation. It will be ample time to decide what sort of rights should be recognized in order to do justice to the cultivators, when this future, but inevitable, development has occurred.

For the rest of India, the question has still to be authoritatively settled. It has not yet been decided by the legislature, nor definitely settled by judicial decision[8].

The difficulty of the question consists in this, that speaking of the point as one of *legal right*, though the ordinary *criteria* of a legal right are not complied with, still there are equitable considerations, which naturally produce in the mind a sense of something analogous to and even closely approaching a right. And speaking of the point as one of *fair dealing* and *administrative*

[8] Although several passages in the Kanára case lead directly to the inference that the Judges would have answered the question (*as a point of law* and apart from certain *equitable* considerations to be noted presently) in the negative. The point, indeed, was not directly in issue in that case (which was a claim to proprietary right in the forest, soil and all), and throughout it is unfortunate that the case was not argued before the Court by lawyers familiar with forest jurisprudence, and therefore, many important points were not taken. In the passage quoted above (see note 8), Mr. Justice Green puts it hypothetically—"*if* it is considered that a right to have kumri carried on, &c."; but it will be seen that the learned Judge considered the Government would have a *right to stop kumri altogether in forests that were not shown to be private property.*

policy, there are cases where such cultivation is not only locally harmless, where it is natural and suitable to the locality, but where its hasty suppression would result in great suffering, and possibly in depriving the forest officer of the services of the only tribes who will undertake forest work and furnish guides and helpers. The material destroyed may be in such abundance, that it has far less value than the crops raised; and even if it has value, its utilization and export may be impossible, while the necessity of food production demands its removal. On the other hand, there are cases where the waste of timber is intolerable[9], where the steep slopes on which this practice is carried on, are at the head-waters of streams, and in other localities where the forester knows it is of the highest importance to maintain forest. Here, for the benefit of a few villages or a limited tribal population, the hills are to be denuded, the soil washed off, streams below to be dried up, and creeks once navigable to be choked with silt[10].

The practical solution of the question is, I venture to think, that adopted in the Burma Act. It is to refuse to create a legal right, which does not, strictly speaking, exist; and at the same time make practical provision for settling claims on equitable grounds, and for

[9] A forest officer informs me that he has been able to estimate the value of timber on a júm clearing in the Gáro hills, cut and destroyed, at Rs. 2,000 to 4,000. In this case the land does not belong to Government; but this is only an instance of what well may be the case elsewhere, as regards this one question of the value of timber destroyed.

[10] As in parts of the Konkan. And then it is very easy for writers to draw harrowing pictures of the poor hill people prevented from pursuing the 'simple practices of their forefathers' and driven from their sylvan haunts by an army of 'ignorant and unsympathetic forest officers.' The tendency of such pictures, possessing as they do a degree of truth on one side, is only to inflame the official mind with departmental and personal feeling, instead of directing it to the grave and dispassionate study of the question; really giving weight to the facts (if they happen to be locally existent) which would necessitate forest preservation, and thereby affording a strong incitement to resolute effort in the direction which is so necessary in such cases, namely, in the direction of establishing permanent cultivation and founding villages in lieu of shifting hamlets and temporary clearing. So long as the Forest Settlement Officer, or other official, is in an uninformed and biassed state of mind on the question, so long he is sure to overlook both the importance and the feasibility of this remedy.

allowing such cultivation on defined areas and under certain conditions inside the forest or outside, as circumstances require.

The argument against the practice giving rise to a right might be briefly indicated as follows :—In the first place, the 'right' is exercised so extremely 'discontinuously' that it cannot be said to be maintained over any definite ground: there is no fixed 'servient estate' on which the right has been openly, peaceably and as of right enjoyed for a long period of years.

This, however, is a question of degree, for where the population is denser the rotation is shorter, and I have alluded above to the existence of cases in which an actual occupation of the soil must be virtually admitted.

Again, it is true that there can be no such thing as a *right* to a wasteful and destructive user of another's property. There is no "*salvâ re substantiâ*" in the toungya usage. The waste is sometimes frightful: not only is the direct loss of timber and destruction of forest capital most serious, but the indirect mischief caused to the estates lying below, by the ravinement of the hill-sides, by the detritus that comes down, and the silting up of streams and the drying up of springs, is still greater.

On the other hand, this too is a question of degree: the practice may be found in hills where the value of the crops far exceeds (as far as the hill population is concerned) the value of the timber for which, in many places, there may be no local value whatever and no means of export.

§ 42.—*Practical conclusion.*

Under such circumstances then, I submit that no hard-and-fast legal right should be recognized, but the Government should be free to deal with the practice by rules and to recognize practically all the equities of the case, and the time may come when it may be desirable to recognize more formally the growth of actual rights in specific cases. This conclusion derives additional force from the fact that it has been adopted, as regards Burma, by the legislature.

Whenever the practice is really dangerous, Government must exercise its right to stop it. The gentle and persevering efforts of sensible officers will rarely fail to succeed in getting rid of the practice without causing any suffering whatever. It was so extinguished by Sir Mark Cubbon in Mysore; a great measure of success has been attained in the Central Provinces and in Bombay. And always the first step was to make liberal contributions to aid the people in getting seed, ploughs, and cattle, or whatever else is needed to get them to settle down, and terrace the hill-sides into permanent fields, or emigrate into the plains where level cultivation is possible. Where the interest of the whole country and its water-supply is bound up in the preservation of forest, as on the Western Ghâts, resolute and persevering efforts directed to this end will generally be successful.

Where it is not possible or necessary to shut out such cultivation altogether, it is essential that defined blocks should be permanently assigned in the forest area, and effort has to be directed to fire-tracing these blocks, so as to get the people to prevent the fire from their clearings spreading to the adjacent forest. That this is possible is amply proved by the practice of the people in the hills between the Sittang and Salween rivers in Burma, to which I have already alluded.

CHAPTER VI.

THE PROCEDURE FOR CONSTITUTING PERMANENT FOREST ESTATES (RESERVED FORESTS).

SECTION I.—PRELIMINARY STEPS.

§ 1.—*The first Notification.*

The procedure prescribed by the Acts is a perfectly natural one. First (section 4; Burma, section 6), a preliminary declaration is made, of which the object is to intimate to the public and to persons interested, the intention of Government to proceed to the constitution of certain tracts as reserved forests. This declaration, of course, must specify the limits of the proposed forest, or otherwise no one can tell whether he will be affected by it or not. It is not necessary (but it is of course allowable) to have recourse to artificial marks, posts or pillars, to indicate, in the first instance, the *proposed* limits of the forest generally; it is enough to specify the limits by such general indications as practically meet the object in view. It is not wise to go to any expense in putting up marks at this stage; because it is obvious that they may be more or less altered during the process of settlement. The *permanent demarcation*, which is so necessary a part of the work of establishing forest estates, is the last stage of all, when everything is settled.

The notification also takes the opportunity of appointing an officer, called the "Forest Settlement Officer," who will be the proper authority to whom claims and objections have to be addressed.

Such an officer is usually not a forest officer, so that he may be perfectly unbiassed by any professional interests. It will be observed that this does not, in any way, prevent the practice, which is both usual and necessary, of deputing a forest officer also, to represent the interests of Government, though that officer cannot

decide any case or issue any order. In most cases, indeed, the forest officer first examines the country, looks to the necessities of the case, and satisfies himself, as far as possible, that the constitution of a forest estate is possible; he then submits a report, with sketch maps, explaining the objects in view, and establishing the desirability of constituting a permanent forest in the locality. Government then considers this, and if it approves of the plan, it directs a settlement, and issues the necessary preliminary notification. Cases may, however, arise in which, owing to great uncertainty as to what is waste land, and what is included in villages, it may be necessary to appoint a civil officer (usually of the Revenue Settlement Department, as such a task can only be accomplished in connection with a Land Revenue Settlement under the Revenue Act) from the very first. He will have to ascertain what lands it may be *possible* to propose. This officer will naturally seek the advice of a forest officer, and the result of their preparatory work will be to make it possible to issue the preliminary notification, after which the officer in question will probably be formally constituted the Forest Settlement Officer.

§ 2.—*Ad interim prohibition to fresh clearances, &c.*

When once this notification of proposals is out, it is obviously desirable to prevent fresh complications arising in the area by people continuing to occupy new land or to acquire rights. Section 5 (B. 8), therefore, prescribes that no one shall make fresh clearances for cultivation, or otherwise appropriate or occupy land, nor can any process of prescription for the acquirement of rights go on[1].

A person may be within a year or two of completing his twenty years' exercise of some practice which would then become a right; but the issue of the notification would be a bar to his completing the acquisition. Only such rights *as exist* are saved, and such as Government expressly desire to grant. A person who has a right

[1] The Indian Act has provided in section 25 a special penalty for cultivation clearance, or other act violating this section 5. The Burma Act is similar.

already, may of course transfer it to another person, supposing it is the nature of the right to be transferable.

This provision is very necessary, since, if people were to go on developing new rights, and appropriating new clearings, the settlement would never come to an end. As fast as the first set of claims had been dealt with another would appear.

It is also absolutely necessary to draw the line and fix a *date* at which it may be ascertained that the existing conditions of rights were such and such; then it is easy to protect the estate in future from being burdened afresh with rights.

§ 3.—*The Proclamation.*

The next step is to explain to the neighbours what will be the consequence of making the land into a forest estate, and invite them to put forward all claims and objections within a certain reasonable time fixed at three months (section 6, B. 7).

The preliminary notification having been issued, and the Forest Settlement Officer being in readiness, the "Settlement of Rights" is the next important stage. All who desire to claim any plot of land as their own inside the proposed forest, or to make known any right of user or other interest which may be adverse to the Government title, have now the opportunity of getting their rights fully established.

The settlement, in fact, is a simple and speedy procedure whereby the rights of the State may be separated from those of individuals, and thus disputes may be set at rest, and injustice and hardship resulting from the assertion of the State's rights in the forest, be prevented or redressed. Claims may be presented verbally, and they are taken down by the Settlement Officer in writing.

Written claims are put on the file for hearing. But the investigation goes a step further still. The forest may be inhabited by ignorant tribes; the right-holders may be peasantry who do not thoroughly understand the object of the notice they have received, nor the necessity for making a regular claim or the method of making it; permission is therefore given for the Settlement Officer

himself to examine Government records and make enquiry from persons who are likely to have information, so as to be able really to dispose of the whole question exhaustively[2].

The claims made will be found to come under one or other of three distinct heads, and a moment's consideration will enable any one to understand that they cannot all be dealt with in the same way:—

(1) Claims to land ("interest in or over land") in the area proposed to be constituted a reserved forest.

(2) Claims to a right-of-way (public or private) to water-course, or to use of some spring (or pond for watering cattle or otherwise).

(3) Claims to forest rights, grazing, wood-cutting, and so forth.

SECTION II.—CLAIMS TO LAND.

§ 1.—*Nature of the Claims.*

It may appear that inside the proposed forest are plots of land held in proprietary right, on mortgage, and so forth. It is, of course, possible also that some one may claim the *entire area* of the proposed reserve; but this is not likely, since the general position and *status* of the land will have been known before the proposal to form a reserve was notified[3].

The most usual form of such claims is to plots of land either compact or scattered about within the forest area. The true extent and limits of these plots it may sometimes be difficult to ascertain. But if the plots have been properly and lawfully

[2] The Indian Act has omitted to state that the Forest Settlement Officer is to hear, record and decide on objections which the forest officer in attendance may have to make to any claim (Burma Act, section 9.) But it is always the practice to do so, and it is clearly the intention of the Act that this should be done, because an appeal may afterwards be lodged (section 16) in the interest of the forest, and if the objection had not been considered and adjudged in the first instance, the appellate court would be at a disadvantage in deciding the appeal.

[3] If, for example, it was known that Government had given up the proprietary right, and only retained the right to the trees, it would be no use attempting to proceed under chapter II; section 79 would have to be made use of.

brought under cultivation, there should be either settlement papers and measurements, or the terms of a distinct permission, in writing (signed by some Land Revenue authority), which show the position and area of the land permitted to be occupied.

In Himalayan forests the habit of the people to clear a little patch here and another there, all over the forest, is inveterate and has to be guarded against.

These little patches are often commenced by a permission, not to cultivate, but to cut six or seven trees only; a clearing is then surreptitiously made on the spot where the trees were felled: at a suitable opportunity the little patch is further extended round the edge; then a few more trees are cut, or are observed to die conveniently, and ultimately two or more of these patches unite into one. This process goes on till either the forest disappears, or else is so "honey-combed" that, unless the land can be reclaimed for forest and planted up, the utility of the whole is destroyed. Land brought under cultivation in this way may always be regarded with suspicion. It should be measured, and, whenever it is possible to trace the permission to clear, the area should be reduced to what was really authorized.

Clearings of this sort are also made, not directly for cultivation but for herding cattle[4]; in this case it is impossible that they can be the subject of any permanent right, and the allowance of any interest in them will rather depend on arrangements determined on with reference to grazing rights, than on any right to the soil cleared.

§ 2.—*Method of Settlement.*

When the true extent, position and authority for the occupation of such inclosed land has been ascertained, the Act (section 10) empowers the Forest Settlement Officer—

(1) *to exclude the land from the limits of the forest, i.e.,* either to alter the proposed boundary so as to let it remain outside the forest, or leave the land inside the

[4] In the North-West Himalaya such clearances are called "tách."

forest as a privately-owned plot not subject to the forest régime. In this case great care must be taken that the limits of the land are permanently demarcated so as to prevent future encroachment; and that all subsidiary questions are settled, such as a right of way for the cultivator and his cattle through the forest to the land[5], any precaution about lighting fires on the land, which may spread to the forest, and so forth;

(2) "*he may come to an agreement with the owner for the surrender of his right.*" Under this head an exchange is often possible. Such cultivation is often of a very rude kind, if indeed it is really permanent at all; it will often happen in any case that the owner will agree to give up the plot in exchange for another piece of equal extent (or a little more, as the case may be) in another place. In this way a suitable corner of the forest may be cut off as a block of available land in which a number of little patches inside the proposed forest may be provided for. Under this section money or other compensation can, of course, be given by amicable agreement;

(3) "*or he may proceed to acquire such land in the manner provided by the Land Acquisition Act.*" In this case the Settlement Officer is vested with the necessary powers under that Act, and the process is compulsory. It would be followed on failure to come to terms under No. 2.

I should remark here that it is always better to resort to the procedure under the expropriation law when there is any doubt about the title to the land, because in that case Government gets

[5] It would be held in such cases that the owner had always a right of way to his plot, and the right would include a way for cattle or carts according to the nature of the locality and the circumstances of the cultivation. You could hardly in the nature of things, have a plot of land from which you could derive no profit by reason of want of access. This point is expressly ruled in the Italian Civil Code (§ 593) and in the French Civil Code (§ 1018); see also Curasson (I., 331); and so in English law, Kerr's Blackstone, Vol. III, pp. 35-36 (London, 1857); Williams, p. 322.

the land with a clear title. If land is taken by agreement it is necessarily taken only with such a title as the owner really has. In many cases there can be no room for doubt about this, and then agreement is a perfectly safe, and, of course, much more economical and expeditious method. Otherwise, proceed under the Act, because then the title acquired by Government cannot, under express provision of the law, be questioned.

I should also call attention to section 83 of the Forest Act (B. 80), which declares that land required for any purpose of the Act is deemed to be wanted for a "public purpose," and that the Land Acquisition Act consequently applies.

SECTION III.—CLAIMS TO RIGHT-OF-WAY OR WATER-COURSE.

§ 1.—*Special character of the rights.*

It will be observed that, as regards their settlement, these claims are on a different footing to other rights, and that arises from their nature. A right-of-way, for example, cannot, in the nature of things, be compensated for. Either it is a necessity or it is not. If it is a necessity it must be left alone; the only alternative is to provide another road which is reasonably convenient and does as well as the original, though less inconvenient to the forest control. Rights of water-course, which may be of several kinds (rights to the use of water naturally flowing, or rights to take drainage or canal water for irrigation across the forest) are on the same footing[6].

Under the Indian Act, the Settlement Officer does not deal with such rights at all. He neither admits nor rejects them.

[6] Such rights are not numerous, nor usually of great importance. They may arise in hill districts, where channels to conduct the water of streams along the hill-side to cultivated fields are often constructed; such channels may pass through a forest. In the plains, canal cuts sometimes pass through fuel or other plantation and forest. In the case of canals some provisions relating to the passage of water-courses may have to be referred to in the North Indian Canal and Drainage Act VIII of 1873 (section 23 *et seq.*), and the Canal Acts of other provinces.

Such rights, however, occasionally arise when a stream passes through a forest.

Under the Burma Act if he admits a claim he makes a record accordingly, but this is all. Practically, rights-of-way for individuals are not known, and those which affect villages or the public at large are evidenced by the existence of at least a cleared and known track or dry weather road. It was considered sufficient to let the whole subject alone at the Settlement; no tracks or roads that exist being in any way interfered with.

§ 2.—*Power to alter Roads, &c.*

A general power is, however, given under section 24 (B. 24) to close at any time, a public or private way or water-course, when this is really unnecessary and interferes with the management of the forest; but this power can only be exercised with the previous sanction of Government, and *provided* that a substitute, "which the local Government deems to be reasonably convenient," has been constructed or provided.

The reason of this provision is, that a forest, when first being demarcated and settled, is not yet in a condition in which it can be said that a road in this or that direction is injurious or not, The management has yet to be developed. It may be that the division of the forest into compartments by cleared pathways, the clearing of fire lines and other such arrangements, may afford straight and convenient routes which may replace devious and uncertain tracks hitherto used. When this is pretty well known, it is time enough to close old objectionable roads and substitute the new ones. There can be no doubt that this plan is the best suited to the circumstances of the country. At the same time, as persons may bring forward claims, it is better (as the Burma Act provides) to allow the Settlement Officer simply to record them.

§ 3.—*Questions as to Width of Road, &c.*

It will be noticed that the Act contains no provision for defining what sort of right-of-way is allowed to exist, neither for this or that purpose,—of this or that width.

If the Settlement Officer should find it desirable to record some

definite terms regarding the width of the road, and whether it is solely for the use of human beings and not to drive cattle on,—or any other conditions (which would naturally be adjusted by him according to local circumstances and the requirements of the case), there would, I apprehend, be nothing to prevent his doing so if the conditions of the right had been adjusted by consent. If not, as far as the Forest Act is concerned, the only plan would be for the forest officer to get the Government sanction to arrangements proposed under section 24. He would mark out the road he considered a proper one, making it of a sufficient width, and he would explain, in submitting the matter for sanction, the reasons which led to the selection of the particular line, and the particular width of road[7].

[7] It is hardly necessary to caution the student that it is not every casual track that may happen to cross the forest, that constitutes a public or a private *way*. And if there is a question whether a particular track is or is not a "way" by public or private *right*, the point must be settled on its merits.

People are often in the habit of crossing over unfenced waste or forest, and yet they may acquire no right (per Abbot, C. J., in *Blundell* vs. *Catterall* (5,B and A, 315).

It may be interesting just to indicate some of the features of early and modern law on the subject of rights-of-way.

The Roman law (Justinian, Lib. II., Tit. iii—this has colored all the later laws) divided rights of way into three classes:—

(1) *Iter*, which was a simple right of passage for man on foot or on horseback,

(2) *Actus*, which was a right to drive cattle and vehicles,

(3) *Via*, the most general right, which included (1) and (2), and also (in the absence of special agreement to the contrary) the right of dragging timber, &c. over the land.

The extreme width of land that could be occupied by the complete right-of-way, in the absence of special terms of grant, &c., was 8 feet in a direct line, and 16 feet where it turned to change its direction.

The Bavarian *Landrecht* (Theil II, Kap. VIII, § 11) allows (in the absence of special terms) 3 feet for a simple right of passage and 8 feet (16 at turnings) for the right-of-way for cattle or carts.

The Prussian *Landrecht* (Theil I., Tit. 22, § 79, as quoted by Roth, §§ 263—65, and Eding, p. 99) allows 3 feet for simple passage, 4 feet if the way is to be ridden over, 8 feet (12 at turnings) for a cart-way, and 16 feet (24 at turnings) for cattle driving.

The Saxon law gives 3 feet and 8 feet, as the Bavarian, but allows circumstances to be considered in fixing a proper way for cattle-driving. (Qvenzel, p. 193.)

The Italian, French and Austrian laws do not prescribe any fixed breadth, but leave the right to be determined (in the absence of course of special evidence),

§ 4.—*Rights of Water-course.*

Rights of water-course do not need any special remarks, so far as they appear in the form of a claim to have a drainage channel or an irrigation channel taken across the forest land.

But claims which may come under this head will sometimes be made to the use of a stream which passes through the forest, or (what is analogous) to use a spring, or pool of water, in the forest, for domestic requirements or for watering cattle. Such a right is recognised among those called easements in English law[8], and it will be found that the right to use the water will always involve a right-of-way to get to the water, or to drive cattle to it, as the case may be.

I have known instances, in practice, of such rights claimed in a forest, and therefore I mention them. They should be in all cases recorded, or disputes will arise; and as the right-of-way to and from the water will necessarily be involved, the matter can be settled under section 24. Practically, there is no difficulty, for either the use of the water is a necessity which can be established, or it is not. If it is, the use of it *must* be allowed, and also of a way to get to it,—no substitute or compensation is possible: if it is not, that is to say, if other springs, reasonably convenient, exist, the use of the water and of a way to approach it can properly be refused.

according to the circumstances and the nature of the locality. The English law contains no special provisions on the subject, as far as I have been able to ascertain. I presume that the general circumstances would be taken into consideration.

A right-of-way may sometimes be required across intervening private lands to drag timber or other material out of a forest: without this the forest might be unworkable. The Burma Act makes express provision for this under the head "Control of timber in transit." The Indian Act makes no allusion to the subject; a strip of land for a timber road could, however, be expropriated. The only European law in which I have seen this right expressly asserted is in the Austrian Gesetz of December 1852, § 24. In France and Italy, the matter would probably be covered by the general provisions of the Civil Code, which require access to be allowed to "enclaves," *i.e.*, property surrounded by other estates, so that it cannot be got at without crossing one or more of them.

[8] Williams, p. 18.

SECTION IV.—CLAIMS TO OTHER FOREST RIGHTS.

This heading indicates by far the most important branch of the forest settlement; and it will require careful attention, as well as the detailed examination of some important principles which underlie the question of "settling forest rights."

§ 1.—*Recording and admission of claims.*

In the great majority of cases the result of the Settlement Officer's enquiries, and a perusal of the claims which he has received in writing and taken down from the mouth of the applicant, will be to show that rights are claimed in a very general and indefinite way, and without any limit to the number of cattle that may be grazed, or to the quantity of wood that may be cut, and so forth.

The reason of this is to be found in the origin of rights in India. They rarely originated in anything like a formal grant, the terms of which can be referred to. Even when there are orders (somewhat analogous to a grant) passed at a former land revenue settlement (made at a time when forest interests were thought of little importance), the terms will be found almost as general and indefinite as the claims themselves. The "jungle" being largely in excess of the occupied lands, and of the wants of the population, people then went into the nearest wood and took what they wanted; they drove their cattle to the most convenient place where there was grass, and also water and shade. Even where the habits of the people were pastoral, the vast tracts of forest were far in excess of the actual acreage requirements. Nobody then cared how many cattle were grazed, or how much wood was cut. The march of events, however, has put a period to this state of things. The population has increased largely, the forest has become more and more restricted, and it is now a matter of importance to know to what extent such rights have to be provided for. Following the general principle that indefinite rights cannot be made more burdensome to the State than need be, the rights will, in nine cases out of ten, be really rights for the actual personal and domestic wants

of the right-holder. The Settlement Officer has, therefore, the duty of reducing general claims to something definite and tangible.

There are still places where a very general definition may be thought sufficient; but forest management does not look merely to the present nor even to the immediate future. As years go on, the necessity for defining these rights will become greater: and what would have been easy once may become more and more difficult. It is well therefore not to delay. Not only so, but as the settlement of a forest estate involves in some cases paying compensation for rights, it is obvious that the right must be valued for the purpose of awarding its equivalent, and it cannot be valued unless its nature and extent are fully known.

Lastly, in not a few cases, definition and the fixing of number or quantity in the case of an unlimited right, is in itself sufficient to ensure the right-holder's permanent enjoyment of it; since it allays all doubts as to whether the forest can continue to supply such a right or not[9].

[9] The condition of European countries, in respect of forest-rights, is very different to that of India. Rights there exist under much more definite and long-established legal conditions. In Bavaria (Law of 1852, § 27), the owner or right-holder can either of them claim to have an undefined right made definite. Each party bear half the costs of the proceedings if they have to go to a law court, because they are not agreed. In Prussia the rule is similar (*Landrecht* I., Theil, 22, § 235). The subsequent dealings with rights, the commutation (*ablösung*) and the regulation of rights, when exercised in a forest, are matters of the forest law, or of a special law for the extinction of rights. In Italy (Law of 1877, Art. 30), right-holders were allowed two years from the date of the promulgation of the law, within which to claim these rights and get them recorded. A further period of six months' grace was allowed, during which rights could still be claimed, but subject to a fine or penalty. After that, all rights were extinguished (*gli altri s' intenderanno decaduti de qualsiasi diritto*).

The French law (Code For., Art. 61) declares that no right can be recognized which is not already established by an Act of Government, or a judgment, or which was not claimed and recorded before the proper tribunals within two years of the passing of the Code. The Forest Code itself provides in other sections for buying out rights and for regulating them.

The Austrian law (Art. 9, quoted by Grabner) provides that either the owner, or the right-holder, may claim to have a scheme recorded which sets forth the true extent of the right, how it is to be exercised, and within what limits. As the basis of

The Forest Settlement Officer's task is then to find out the real nature and extent of the rights.

§ 2.—*Two Questions involved.*

But there may be two distinct points involved in the settlement of rights: *first,* there is the admission or rejection of the claim, and if admitted, the recording of the claim in some definite shape; *second,* if the right is going to be allowed inside the forest, there is the further question, how far can this be arranged or regulated so as not to injure the forest?

The Indian Act has not separated these two points. The 13th section requires the Settlement Officer, in making his record admitting the claim, to define at once the number and description of cattle, the season during which they graze, the quantity of forest produce and other particulars according to circumstances.

The record of all these matters in full is hardly possible till the further question has been considered, *how these rights are to be provided for consistently with the maintenance of the forest.* The Act, however, appears to suppose that the second point will have been considered *before* any order is made admitting the right at all, and that when such order is made, the recording officer will be in a position to detail the restrictions on the exercise of the right, which are imposed in the interests of prudence, and to secure the fair treatment of the forest[10].

this scheme, a proposal (*entwurf*) is prepared by skilled persons; the objections of either side to this are heard and adjudicated, and the *scheme* for the exercise of the right, as finally adjusted, is authoritatively recorded.

Further, the "Imperial Patent" of 1853 declares (Art. 4) that all rights which are so necessary (or otherwise) that they cannot be got rid of by compensation, must be settled as regards their details, and the place, time and manner of exercise, *so as to make the rights as little burdensome as possible to the forest, consistently with their fair and reasonable enjoyment.*

[10] It is quite possible that a man might show that his ancient customary practice has been to graze as many as 500 cows, so that it is impossible to deny his 'right' to graze 500. But the forest may only contain grass enough to graze 250. In that case the right cannot go beyond the limit of 250.

When the order is ultimately made admitting the rights to exercise *in* the forest, then it is "to the extent admitted" (section 14*c*.).

There are indeed, or may be, certain rules by which an unlimited right is held to be restricted, which have nothing to do with forest conservancy or the state of the forest. The rule that an unlimited right means a right only for the person's own wants, and not for sale, for example, does not depend on any question of the state of the forest. But all laws recognize a power of regulation over and above this, and dependent solely on the question of the state of the forest, and it is hardly convenient to defer the admission or rejection of the claim until all such matters have been considered.

The Burma Act has, therefore, introduced an improvement. It directs the Settlement Officer, in the first instance, to record such particulars as may be necessary to exhibit the claim admitted with reasonable precision—to admit the claim, as, in fact, it has been previously exercised, supposing the forest can bear it. This gives him the opportunity of determining at this stage such matters as the duration of the right, the power to sell the produce and so forth, which can be ascertained at once without reference to the forest question. The adjustment of the exact number of cattle to be allowed, the quantity of wood or other produce to be granted, and some other matters of detail, are left to be further adjusted and recorded when it has been determined that the right must be left to be exercised within the "reserved" forest. For, it may be found possible to provide for the right outside (by means of a portion excluded from) the proposed forest, and in that case there would be no object in minutely regulating it, though of course the right must be made reasonably definite and certain by record. The right-holders have it on their own responsibility to exercise their rights with moderation and prudence, or the place granted them for the enjoyment of their right will cease to give them what they want.

§ 3.—*Distinction drawn between definition of right according to nature and incidents, and the further regulation of the right according to the state of the Forest.*

I shall therefore follow the order of the Burma Act, and first consider some general questions which bear upon the nature and extent of rights, independently of the condition and yield-power of the forest, and which, consequently, can be gone into in the first stage when the recorded admission of a claim is made; and I shall reserve such remarks as I have to offer on the subject of the regulation of rights till afterwards.

SECTION V.—DEFINITION OF RIGHTS ADMITTED ACCORDING TO THEIR INTRINSIC FEATURES.

§ 1.—*Rights conferred by grant in set terms.*

In some cases it may be that the general features of the right are defined already by a written order or grant, and then it will be understood that the grant or order is itself the very best evidence of the nature, extent, and incidents of the right. And it, no doubt, occasionally happens that individuals or villages hold "sanads" or "parwánas" or other documents issued by the Government or some high authority at the time, distinctly recognizing certain practices or enjoyments of forest produce which are, if the grant does not clearly contain words limiting the duration or reserving the power to recall the permission, practically *rights*. Sometimes orders at settlement have been passed, which, in effect, amount to *grants* of forest rights. Such orders are often in very general terms, and will need to be fairly interpreted so as to enable the rights granted to be defined.

In India there are no technical rules about such 'sanads' and orders: they must be fairly and reasonably interpreted.

In a case in the Bombay High Court known as the Pigondé

case (*Conservator of Forests* vs. *Saubaghyadas*), the Judges quoted as authoritative the ruling of the Privy Council as follows :—[1]

"Upon a question of the meaning of words the same rules of common sense and justice must apply whether the subject-matter of construction be a grant from the Crown or from a subject" * * * * * * "It is always a question of intention to be collected from the language used with reference to the surrounding circumstances. *If those guides fail but not otherwise*, the ancient rule that 'if the King's grant can enure to two intents, it shall be taken to the intent that makes most for the King's benefit' may be followed."

In the case of a forest, I submit this rule is very reasonable; for the forest exists for the public benefit, and if there is uncertainty about the grant, the grant ought not, on general principles, to be held to burden the property more than is necessary. Where the grant can, however, be interpreted by its language and by the circumstances, there the true intent must be allowed.

In the first place, the right may be either claimed as *personal* or *appendant*[2]. In the one case it will be necessary only to record the name, father's name, caste and residence of the claimant, but in the other, it will be needed to record the name or designation, the position and other particulars of the land, building, monastery,

[1] *Lord* vs. *Commissioners of Sydney*. (12, Moore's P. C. cases, 497.)

[2] I may remind the student that these terms have already been explained in the Chapter II, section 7, on Servitudes). Since writing the Chapter the Burma Forest Act has become law, and this does not use the term *appendant* but speaks of the right being "for the beneficial enjoyment of" any land or building. I have also observed, and may here bring the matter to recollection, that, however the European text-books lay down that forest rights are "real" servitudes, *i.e.*, always appendant, or enjoyed in virtue of the holder's connection with some specific land or house, &c., (which is called the *dominant estate*) the same assertion cannot be, at any rate universally, made in India. Facts can be the only guide. A notable instance of a right of grazing being personal and not appendant is offered by the grazing rights in the Kangra forests (Panjab), where graziers come from the higher hill-ranges, many miles away, and during certain seasons of the year occupy, according to ancient custom, certain known tracts or "beats" of the forest in the lower ranges. Here the graziers have the right "in gross," quite independently of their holding any specific land or property. On the other hand, some rights may be, in their nature, appendant, *i.e.*, a right of way or water-course, for it is hardly possible that A. can have a "way" across B.'s land, unless he has some land or house to get to or from.

school or institution to which the right belongs. (Indian Act, sections 12-13.)

§ 2.—*Whether the Produce may be sold.*

It may also be a feature of the right itself (although this is again disallowed by the French, German and Italian laws[3]) that the produce of the right may be sold. In some parts there are jungle tribes, who make at least a part of their living by cutting bamboos, loads of grass and firewood, and carrying them for sale to the villages and towns at the foot of the hills.

This fact is then one of the features of the right which it is important for the Forest Settlement Officer to ascertain and record.

§ 3.—*If not, the Principle to be followed.*

Otherwise, it is a general principle, which it is important to maintain, that the right (if not otherwise defined by the terms of a grant or other specific evidence) is for the right-holder's own use and convenience, and to be measured by his actual personal or domestic wants. In other words, he may have what he wants for his own use, but may not sell or barter the produce obtained[4].

[3] See, for example, Art. 83, Cod. For. But *Meaume* says that it is to be understood that if the forest-owner does not object, there is no reason why the produce should not be sold in some cases (*Meaume*, Vol. I, p. 466, § 407). *Roth* (§ 306) thinks that produce should be saleable if the right is to a fixed quantity (because the forest has to supply *that*, and it cannot matter what is done with it), but not so, of course, where the right is only for the right-holder's own wants and convenience. Otherwise, there would be a fraud on the forest-owner. So *Eding* (p. 111). In English law the rules (which depend on the right being of one kind or another) are not very clear. It would seem generally that the produce of a right "in gross" (personal right) to a fixed quantity of material may be sold (*Cooke*, pp. 39-40). On the whole, the law in the India and British Burma Acts is the most reasonable and best suited to the circumstances of the country. The produce is ordinarily for the owner's own wants, and is not saleable, unless it is an express feature in the right that the produce is taken for sale.

[4] This principle is recognized by all the European laws, as well as by the old Roman Law—Justinian, Lib. II., Tit. V, 1. * * "ad usum quotidianum utatur * * * ut neque domino fundi molestus sit, neque ûs per quos opera rustica fiunt impedimento: nec ulli alii jus quodlibet, aut locare aut vendere aut gratis concedere Potest." (See note at page 32 *ante*.) Meaume, Vol. I, p. 13, § 3, and p. 465, § 407.

This principle is founded on the natural equity of the case. As a forest right exists for the benefit of one person to the diminution of the enjoyment of his property by another (the forest-owner), it is plain that the right ought not to be made more burdensome to the forest estate than is necessary to secure a fair and sufficient exercise of it[5].

If a man might get wood not only for his own household but also to supply the market, he might gradually enlarge his sales to such an extent as to ruin the forest, and swallow up its whole produce.

Where, therefore, it is in the nature of the right itself that the produce is for sale, the Forest Settlement Officer must consider the quantity of produce which the right-holder has a right to (apart from the question whether the forest can properly supply so much). Probably he will take an average based on what the quantity taken by the right-holder, in a series of former years (as far as this is ascertainable), has actually been. Thus the right will be definite, and will not be able to be extended year after year.

§ 4.—*The Right itself inalienable.*

Nor can the right itself be sold or mortgaged, or otherwise alienated. If the person entitled to take for his own use, say, 175 trees of a certain growth every year, does not want the trees, he must leave them growing; he could not lease or sell his right to take these trees to another person. The exception to this is, that if the right is appendant, then (of course) it may be sold along with the property to which it is appendant. So also on the decease of the right-holder, the right passes on by succession to

So the French Civil Code (Art. 630): "*Celui qui a l'usage des fruits d'un fonds, ne peut en exiger qu'autant qu'il lui en faut pour ses besoins et ceux de sa famille.*" So Eding (p. 77) Saxon Mandat of 1813, § 5 (Qvenzel, p. 202).

[5] Merlin (Répertoire *v* Pâturage) says: "It is a general principle of Roman law, that '*servitus indefinite concessa, ita interpretanda est, ut fundus serviens minimo quam fieri potest, detrimento afficiatur.*' (A general right granted in unlimited terms is so to be interpreted that the estate shall be as little injured as possible by its existence.")

his heirs. This is also provided by section 23 of the India Act and the same number in the Burma Act.

§ 5.—*Right subject to a payment or service.*

Here I may take occasion to mention another feature which may be found to attach to certain forest rights. A right need not be absolutely gratuitous; it may be properly called a *right* and yet the right-holder may have to render some service or make some payment for it[6]. And this may possibly be the case with rights which were distinctly *granted* by some "parwana," order, or sanad, &c., in which the right is conceded as such on certain conditions. Ordinarily speaking, a right which has merely *grown up by prescriptive* exercise would not have a condition attached to it, because then its origin would be not prescriptive but traceable to some person who gave the right and annexed the condition. When a payment is made for the use of forest produce, it would usually indicate that there was no *right*, but that the produce was leased or sold for the money that was paid, and thus was not enjoyed *adversely*, but on *contract*.

§ 6.—*Right for life or lives.*

A forest right may also be, by its origin, permanent, or it may be for the life only of a certain person, or for several lives. This would be, of course, in cases where the right had been specially granted or allowed, in set terms,

[6] See *Roth*, § 293; Meaume, Vol. I, p. 30. Students from Nancy who have read the *procès verbal* of the working scheme of the forest called la Grande Haye, will remember how a certain *commune* was there entitled (by grant of one of the Dukes of Lorraine) to certain wood-rights in consideration of a "*redevance*" of two "*quarterons*" of good oats and a fowl from each household. Here the area over which the right extended was fixed, while the number of households might increase. This led, in the course of time, to the value of the payments exceeding the value of the right. Consequently, the people refused to take the wood, and the right was ultimately adjusted by compensation and got rid of.

This, of course, is quite different from the case where grazing in a forest is sold annually, or for a term of years, and a contractor buys it. The same person might go on buying year after year, but he would acquire no servitude or legal right; his title would be simply *by his contract*, to have his profits, or the way, or the grass, or whatever he bought.

§ 7.—*Definition of Quantity or Number.*

Lastly, it may occur that either the terms of a grant, or the circumstances of the case, show that the right is in its nature, and apart from any *regulation* for forest purposes, defined to a certain number (of cattle) or quantity (of wood). In practice this will rarely be the case: if it is it must be recorded at once, as part of the *definition* process. But in the great majority of cases, the fixing of quantities, &c., will be a matter which is done under the necessary power given to *regulate* the right (even after it is *defined*) by what the forest can bear. The most likely case in which *number* is a fixed feature of the right itself, is that of grazing rights. I have already considered these cases, but I did so in the earlier section (see page 127), because it was more convenient to conclude the whole question of *number* in regard to cattle grazing, in one place.

SECTION VI.—THE METHOD OF PROVIDING FOR ADMITTED AND DEFINED RIGHTS.

§ 1.—*The three Methods stated.*

When the nature and general features of the forest right admitted have been thus ascertained and recorded, the next thing to do is to make provision for the right.

The Indian Acts contemplate three obvious methods of doing this. The first two, however, leave the right in existence; the third has the effect of *compensating* the right-holder and the right ceases to exist. I must, therefore, deal with the methods which bear the right in existence separately and that of compensation afterwards. The two methods for dealing with rights which are *left in existence* (and not bought out) are:—

(1) Altering the proposed boundaries of the forest so as to exclude a portion of the area, which must be sufficient in extent, and reasonably convenient in situation, for the purposes of the right-holder, and, giving

this up to the exercise of rights:—the rest of the forest is then free[7].

In this case the right itself is not affected; the site of its exercise only is transferred, and that must be so as not unfairly to inconvenience the right-holder.

(2) Recording an order admitting the right to exercise inside the forest, subject to regulation, as to the number of cattle, quantity of forest produce, local limits of exercise, season of exercise, and all other conditions necessary to make the right compatible with a proper management of the forest.

This involves, it will be observed, the *regulation* of the right.

At first, as already explained, the claim to the right, if found valid, is admitted and recorded, and its incidents and features (as they lawfully exist) are ascertained and defined. If it is then determined that the right cannot be provided for in the first method, this second comes into play. The right must be exercised inside the forest, but then it must be regulated within such reasonable limits that the forest will not deteriorate nor will improvement be rendered impossible. Here then comes the necessity for further prescribing to what extent, in what parts of the forest, in what seasons, and under what conditions, it is to be exercised[8].

[7] In the India Act this process is exhibited under two heads, *viz.*,—

(*a*) the provision is to be made in some forest tract *not* being part of the forest under settlement: that means, of course, a "forest tract" in the ordinary sense of the term—not a bit of salt or barren waste, for instance, that would not (in its existing condition) serve the right-holder's purpose;

(*b*) it is made by cutting off a portion of the forest itself, as in the text. Practically, I do not know of any case where this first method of providing for rights has been carried into effect. The alteration of the proposed reserve is what is usually done, and it was thought quite sufficient to include both things in one in the Burma Act.

[8] "Statements of rights" recorded in working schemes or plans should always have two columns—

(1) Right as claimed and defined according to its nature, &c;

(2) Right as ultimately adjusted for exercised in the forest.

But it is also desirable to notice any claims that were made (whether definite or not) which were simply rejected altogether; such a notice will keep the forest officer informed against any surreptitious attempt to exercise the rejected rights.

In other words, the *record* of the right has now to be *completed*, not only with reference to the nature and existing features of the right, but with reference to the maintenance of the forest: and the Settlement Officer, who (especially in this part of the business) will naturally act in consultation with the forest officer, will determine—(as far as practicable)—

(*a*) the number and description of the cattle which the claimant is, from time to time, entitled to graze, the local limits within which, and the season during which, such pasture is permitted; or

(*b*) the quantity of timber or other forest produce which the claimant is entitled to take or receive, the local limits within which, and the season during which, and the mode in which, the taking of such timber is permitted, and such other particulars as may be required in order to define the extent of the right which is continued and the mode in which it may be exercised (Burma Act, section 14); in short, that is to record all terms so as to give no occasion for conflict between the right-holder and the forest administration.

§ 2.—*Process of allotting Land outside Forest.*

A few remarks may here be offered as to these two methods of providing for rights, in all of which the right itself *continues* to exist. As regards the first method of settlement above mentioned there is but little to be said.

It will be observed that the tract provided to be cut off from the forest is not granted to the right-holder in proprietary right, or as compensation, and therefore this process has really nothing in common with the French method of "*cantonnement*" under the Code, of which we shall hear presently[9]. It is only granted to him

[9] Nor is it exactly the same as that of the Italian law, where a grant of land is made in compensation for a right, only the absolute ownership is not given. The title there is what is called *Emphyteusis, i.e.*, the right to everything except the bare proprietary right and subject to a payment of a '*pensio*' or sum in acknowledgment of the proprietor's right.

to exercise his right there. The Act has not at present laid down anything regarding the supervision of the lands on to which these rights are shifted, nor is it apparent whether the lands cut out of the proposed reserve could afterwards, by a separate settlement, be made into a reserved or a village forest, when it became desirable. Practically, as yet, no question on this point has arisen. The people are bound in their own interest to see that they so use the tract that it will *continue* to supply what they want; for if they abuse it, and it fails to do so any more, *they cannot have any claim whatever to come back on the original forest which has been freed.*

§ 3.—*Regulation of Rights exercised inside the Forest.*

As regards the second method, the student will at once perceive the practical application of those principles of the *Regulation of Forest Rights,* which I discussed in full with reference to each kind of right in Part I of this Manual (Chapter V). I put this important subject in the part which deals with *principles* (inherent in the nature of servitudes), partly because that seemed to me the more logical place for it, and partly because, had I introduced it into this chapter on the Procedure of Forest Settlement, it would have involved a lengthy chapter in the middle, which would have caused the student to lose the thread of the description of the several stages of the process of settlement. He should, however, thoroughly master the subject in connection with the procedure at this point, and I may recall to his memory the leading features of the discussion. Rights of user in a forest are not rights of co-ownership and can never be so exercised as to destroy the forest or render it useless to the owner. Hence they must always be regulated to what the forest will bear: the forest is to be maintained in the normal and proper condition for a forest of its class; and the interests of both sides are to be considered: if either the forest is to be put under such a very improved and refined form of management, that the rights must be seriously curtailed, or if it is essential to get rid of rights altogether, then we go beyond a *fair and equitable regulation* of user, and we are naturally led to

the next provision of the law which tells us what is to be done, where it is necessary so to deal with the right that the *right itself* is got rid of.

I shall make no apology for repeating that as long as one of the two methods of dealing with rights just described can be followed, the enjoyment of the right itself is not infringed.

In the first case, the defined right is provided for in a piece of land *excluded* from the reserved forest; in the second, the defined right is allowed to be exercised *inside* the reserved forest, under those reasonable *regulations* and *conditions*, which, while providing for the safety and improvement of the forest (on a normal and natural plan of management), do not seriously or unreasonably impair the exercise of the rights.

§ 4.—*Caution about Rights in a Reserved Forest.*

In this place also it may be desirable that I should remind the reader that there is not least reason why a forest should not be "Reserved" because there are rights to be provided for in it. On the contrary, the very fact that there are a number of demands made on the forest for its produce, make it all the more imperative that the forest should be kept in such order that it may be able permanently to meet those demands. And that is not possible unless the forest is "Reserved," that is permanently constituted a forest estate under the management of the State.

There was a time, which I hope has now gone by, when people imagined that a reserved forest was a kind of luxury, to be had only on a limited scale, and to be entirely free of rights so as to be capable of producing the best timber; and that the bulk of forests were to be left "open" or "unreserved" or "protected" (or whatever phrase was in vogue). The absurdity of such a view will hardly now need exposure; it is all based on the supposition that a forest, *not* demarcated, without any defined limit to the rights which may be claimed, with every villager free to do very much as he likes with it,—that such a forest *will continue to supply*

the right-holders with the material they require, or that mere "rules" made under the Act, will secure forest conservancy[10].

A reserved forest means nothing more than a forest permanently wanted as such, and therefore demarcated, and settled as regards the rights which exist in it. Of course, a certain portion of the forest may be free of rights, and that is a most desirable condition. But equally, of course, a very large portion of it will have not only to bear with rights, but even to exist for the main purpose of supplying those rights. This subject was also alluded to in Chapter IV, (pp. 97, 98) to which the student should refer.

SECTION VII.—OF THE COMMUTATION OF FOREST RIGHTS.

§ 1.—*The third Method of dealing with Rights.*

The provision for rights described in the last section may not always be possible. There may be no surplus forest[1] to give up to the exercise of rights, and the rights which exist are in such number that it is impossible not to recognize that they cannot go on without destroying the last vestige of the forest. It may be that no more regulation, or reasonable restriction, as to time, quantity, method of user, and so forth, will be of any avail. Then the right must be got rid of by compensation.

When the forest right is not provided for in one of the above ways, or (as the Indian Act puts it) **when it is impossible, having due regard to the maintenance of the forest** (*i.e.*, when the forest cannot bear the right without deterioration, or the right would suffer unfair curtailment, and when there is no other land available for the exercise of the rights), **"the Settlement**

[10] There may be exception in some provinces where the *legal difficulty* of getting the forest may be so great that we are glad to get *any* kind of power, however imperfect, to prevent or at least to retard destruction, and therefore accept any position for the forest area that circumstances admit, whether in principle right and logical, or not.

[1] As, for example, where cutting off a piece would leave the rest too small to be manageable.

Officer shall (subject to such rules as the local Government may from time to time prescribe in this behalf) commute such rights either by a payment to such persons of a sum of money in lieu thereof, or by grant of land[2], or in such other manner as he thinks fit." (Indian Act, section 14).

It will be observed, with regard to the provision quoted at the end of the last section, that nothing is said of how the rights are to be valued, or on what principle either the grant of land is to be made or the grant of money awarded. All that is said is that the Settlement Officer may "commute"[3] the rights.

§ 2.—*Points involved.*

But the law involves some very important points, which I must endeavour to bring out clearly.

In the first place it is the *Settlement Officer* who determines, not the parties, whether it is a case for commutation. There is, of course, ample room for his hearing and giving weight to the representations of either the forest officer or the right-holder, that the case is or is not one in which the right should be got rid of specifically by compensation. And the local Government may make rules for his guidance in such matters. Still the ultimate decision rests with him. Next, the principle of decision is whether or no the *maintenance of the forest* is compatible with the rights. The Burma Act, it will be observed, does not use this phrase: it was thought better to leave the ground for proceeding to compensation open and dependent on the merits of the case. For it is possible that rights may be commuted by consent, or for some reason not directly bearing on the "maintenance" of the forest; moreover, "maintenance" as a *legal* term is not very definite. It is better

[2] The Burma Act adds to this '*grant of land*,' that it is to be adopted with the consent of the right-holder.

[3] In French the 'commutation of rights' is *extinction par voie de cantonnement* (cutting off a bit of forest and granting it in full right) *ou de rachat* (money compensation). "*Ablösung*" in German. (*Abtretung* is cutting off a piece of forest.) *Affrancazione di diritti* in Italian.

then not to attempt to define the circumstances under which compensation should be resorted to, and leave that to be a matter of principles and of the circumstances of the case. There is no doubt however, that in practice, compensation will, in the majority of cases, be connected with the impossibility of maintaining the forest otherwise. It is also true that the true "maintenance" must according to reason and equity, be understood as I have described What is to be understood by the "maintenance" of the forest I have already discussed fully in Chapter V, section II (p. 116)[4].

[4] The French law and that of the German States, proceed in a different manner. In the first place, the question has there to be settled,—who is to claim that the right should be got rid of? Is it the owner of the forest that makes the demand, or is it the right-holder that can claim to be bought off?

As a matter of principle it is the soil-owner only who has the strict right to demand the extinction of the right on payment of compensation. As Pfeil remarks (p. 65): "The person who has no ownership of the soil, but only the right to enjoy a specific product of it, can have no claim to determine how the soil and the estate which do not belong to him shall be managed. * * * Still less can he claim that his right should be bought out; he can only require that his right be not interfered with or diminished by an alteration in the usual conditions which have heretofore been maintained." * * * "The right-holder has the right to a specified share in the enjoyment of the produce; it is then contrary to the nature of his right that he should be able to demand a capital sum or a yearly rent in lieu of it."

The French law has adopted this view in Art. 63. of the Code, which, as I before have explained, directly reverses the revolutionary rule put forward in 1792, that the forest right-holder *shared the property* in the forest with the landlord, and that, therefore, he might demand practically the division of the estate, and had to get a portion of the estate in lieu of his right. Art. 63 allows only the *forest owner* to claim to expropriate the right, by cantonnement, *i.e.*, giving up a bit of the forest, in absolute ownership by way of compensation for a right of wood.

The reader will remember that the term "cantonnement" has now no other meaning than this. The Code does not, however, exclude the possibility of a claim on behalf of a right-holder for *money* compensation in lieu of his right, if he prefers to take this, instead of submitting to the restrictions which forest conservancy might necessitate. Whether this could be done or not in practice, I am not able to say, but there is nothing in the words of the Code which prevent it.

On the other hand, though the right-holder can never claim anything but his right, and what it gives him, it is very reasonable to give him the faculty of requiring to be bought out, if his right has to be restricted, and he himself subject to annoyance and to troublesome conditions in order to get what he wants. Some laws therefore permit the claim to come from either party, and some require both parties

§ 3.—*Commutation of Rights when necessity is pleaded.*

Another important question is raised and answered in the French law, as well as in some others—Can you claim to buy out a right if the right is a *necessity* to the inhabitants of one or several communes? The French law does not indeed raise this question for all rights, nor for individual right-holders. It assumes, for example, that wood-rights are never indispensable as free rights. Wood can always be bought. If, therefore, you compensate a wood-right, the right-holder is furnished with the means of buying wood.

In France, wood-rights are got rid of always, by granting in full proprietary right, a piece of the forest of a value equal to the capitalized value of the right: this process is called "cantonnement" (Cod. For. Art. 63); the piece so granted is the property of the grantee. He can either keep it as forest or cultivate it: in either case it meets his wants. If it is kept as forest, it supplies the right in kind: if cultivated, it gives him a money profit or the means to buy wood with.

But Art. 64, speaking of grazing right, contemplates cases where a whole community have no other way of supporting their cattle, and where no sum of money would satisfactorily indemnify them for the loss of a grazing right; in such cases, Government

to agree. It will be sufficient to indicate in a note an outline of the provisions of the chief European laws.

Eding (Prussian law chiefly) says merely "that a procedure and practice have been elaborated, whereby either side can compel the other to accept an equivalent for the heretofore exercised right, respect being had to the opinion of competent persons and to the express provisions of the laws relating to the subject." This, it will be observed, concedes the right to demand to *either* side, not at all because the right-holder is regarded as a joint-owner, which no one would admit for a moment, but on the ground of convenience. By this Prussian law if the right-holder claims, then the forest-owner has the option of saying whether the value of the right, or the value of the advantages which *he* will get by having it removed, shall be taken as the basis of compensation. This is quite fair; he may say in effect, "I do not much want to get rid of your right, the only advantage to me will be, I estimate, valued at so much, if that sum will satisfy you, take it; if not, keep your right." If the forest owner claims, that shows that the advantage to him is at least equal to the value of the right, and he must tender the full value of the right accordingly.

cannot expropriate the right: it is recognized as "of absolute necessity" to a community or to several communes. The question of necessity may, if disputed, be tried before the "*conseil de préfecture.*" The Austrian law is somewhat similar, but takes in both sides. It disallows the commutation of rights when this would "interfere irretrievably with the management, either of the dominant or servient estate."[5] In the excellent Saxon law of 1832, I do not find any mention of this principle, except in connection (section 125) with a right to collect stones, loam, or sand.

The principle is, no doubt, in itself a just one, and it is really and practically involved in the Indian procedure, only it would lead to no useful purpose to specify it more directly.

In all Indian Forest Settlements, there is the intervention of a civil officer,—the Forest Settlement Officer,—whose express object is to see that the people get due consideration; in fact, to hold an even balance between the demands of the public interest in the matter of forest conservancy on the one hand, and the convenience of right-holders on the other. And it is always open to him (and to the local Government on revision of his proceedings) to give up altoge-

In Saxony, a special law deals with "ablösung" or extinction of rights (17th March 1832, Qvenzel, p. 216). Here, also, either side may claim (§ 24). The same condition as to the value to be paid, as described under the Prussian law, is provided (§ 128).

The Bavarian law of 1852, Art. 29 *et seq.* (Roth., § 317 *et seq.*, p. 325) provides that, as a rule, both parties must agree if the right is to be extinguished by a yearly payment, but either party can, under certain circumstances, claim to have the yearly payment capitalized. The Government, however, may demand the extinction of rights in State forests, without such agreement, and may offer either a capitalized money compensation or a bit of the forest like the French cantonnement. The same right is exceptionally extended to private forest-owners in certain cases.

In Austria (Kaiserliches patent, 5th July 1853), it would appear that the forest-owner alone can claim (Grabner, § 17, pp. 258-59).

The Italian law (No. 2794, serie 2*a*, 1st November 1875, Art. 3) allows the Government only to claim the extinction of rights by compensation.

[5] Kais: Patent, 5th July 1853, Art. 5. That means when the dominant estate could not get on without the right, or when the servient estate, if compelled to buy out a right, would have to pay such a heavy sum in compensation as would paralyze its resources, or at any rate prove wholly disproportionate to the advantage gained by the extinction.

ther the attempt to make a forest on land which is really indispensable as a grazing-ground, and which at the same time is not so situated that the safety of the district is involved in its maintenance as a forest.

Another consideration must be borne in mind: it is all very well to say that in some cases a right is indispensable or is very much wanted, but there are hill ranges and other places where, if the grazing right is not regulated to perhaps rather inconvenient limits or stopped altogether for a time, nature will stop it for you by ceasing to produce, on the ill-used soil, the grass necessary for the grazing-right. It is much better to give compensation than to produce this result. Moreover, who is to decide, in a very uncivilized country, whether the right is absolutely necessary? In France the conditions are different, and it may be possible to discuss and settle such a question by evidence and argument before a court of law. In India, it is much better to leave the matter to the Settlement Officer, and in all cases, if necessary, the local Government has power *to lay down any rules* it pleases for his guidance in this matter. The Settlement Officer is bound equitably to consider both the forest interest and the interest of the people, and decide whether a commutation is or is not desirable.

§ 4.—*Form of Compensation.*

The Indian Act prescribes (section 15) the following modes:—

(*a*) Payment of a sum of money which may, of course, be either a periodical payment, or a lump sum.

(*b*) A grant of land.

(*c*) Some other mode determined on by the Settlement Officer, *i.e.*, it may be partly money or partly land; or what is likely often to be very acceptable, it may be a remission of a portion of the land revenue assessed on some arable or other land held by the right-holder: or possibly it may be the grant of some other valuable right

that can be exercised without danger, in lieu of the one that cannot; *e.g.*, the concession to cut grass where grazing of cattle cannot be allowed.

The Burma Act (section 15) has exactly the same provisions, except that if a grant by land is proposed, it is specifically stated that the consent of the right-holders to that form of compensation must be had.

§ 5.—*Valuable Examples from European Laws.—France.*

The means provided by the continental laws are so similar to those provided in the India Act, that we shall derive considerable benefit from a comparison of the two[6], the more so because in India practice in this department of administration has not been so long established as to enable us to fix by law, any definite principle of valuation, although it is obvious that we must have something to go on. It is open, as I said, to the Government to make rules regarding compensation, and a consideration of the experience gained in other countries may afford useful suggestions, if it becomes necessary to frame such rules.

The French law, as we have seen, compensates wood-rights always by a grant of a piece cut off from the forest. It does not, of course, follow that the area given up is equal to the area over which the right extended, for the right was only to a certain quantity of wood, and the land given in compensation is given out-and-out[7].

The right first of all is fixed and defined, and the yearly value of it is ascertained[8]. This value is capitalized at the French legal rate of interest (5 per cent.), or, in other words, the capital is the

[6] Nor need I again urge that the circumstances of the countries as regards the peasantry most affected by the settlement of rights, are not so materially different as to make experience derived from one country useless in the other.

There are, no doubt, refinements of calculation and valuation, and some distinctions drawn which we are not prepared for; but in other respects the wants of the people are often identical, and their prejudices equally strong.

[7] "Le cantonnement compense en pleine propriété ce quil ôte en droits d'usage."—*Meaume*, § 162, p. 223.

[8] Meaume, § 240.

yearly value multiplied by 20. If any payment (*rédevancé*) has to be made for the right, this is capitalized and deducted. A piece of the forest is then[9] valued by experts, and must be equal in value to the sum which represents the value of the right.

Under no circumstance is the piece of forest given up more than half the entire area, for that would imply that the right of the right-holders is really more than the right of the forest-owners[10].

In India, when a grant of land is made, it need not be part of the forest; it is a bit of land which has an ascertainable value, not necessarily forest; it may be culturable land equivalent to the value of the right.

In the case of rights bought out (*par voie de rachat*), for a sum of money, the value of the right is obtained in just the same way, and any expenses attendant on its exercise deducted[1]. The cost of the herdsman whom the right-holder is bound to maintain, and of the cattle bells he has to provide, would probably come under this head[2]. The net annual value of the right is then capitalized at 20 years' purchase as before, and the sum is paid in money.

§ 6.—*Compensation under German Law.*

The German authors describe a system still more resembling our own. vonBerg[3] reckons the means of compensation as—

(1) giving a yearly payment;
(2) the same capitalized in a lump sum;

[9] Meaume, § 244. I need hardly repeat that in *all* these cases, where a bit of land is given, either a piece of the forest or separate, under any of the European laws, the grant is in full proprietary right, and is therefore an actual compensation. It must not be confused with the mode of settlement in India described in the previous section, which is not *compensation* at all—whereby effort is made to exclude a portion of the forest from being reserved, and allow the exercise of the right in *that*, instead of inside the reserve. We have the procedure of granting a bit of land—as a *valuable* thing—in compensation for a right, *besides* this, and in cases where it cannot be resorted to.

[10] Meaume, § 193.

[1] Because the expenses will no longer have to be borne.

[2] Meaume, § 257.

[3] vonBerg, p. 189, *et seq.*

(3) "abtretung," or giving up a piece of the estate;

(4) granting, in lieu of a wood-right, after it has been regulated, a fixed grant of wood called "holz deputat," which can be sold or disposed of entirely at the grantee's pleasure.

The third method can only be adopted when there is land suitable to the grantee's requirement; forest if he require forest, or fit for cultivation if he require to cultivate.

The Prussian law is similar[4]. It requires that if land is given as compensation for grazing, the land can only be given if it is fit for agriculture or meadow land; and it is not considered fit if it would produce less under such treatment than it would under forest, and then the party giving the land may remove the wood on it, having three years to do so, but paying rent for the land meanwhile. Wood-rights and rights to take decayed leaves may be compensated by land, but the land here may be fit only for forest, provided it is capable of being continually maintained in a proper state as forest: if it is high forest, it must be not less than 30 acres in extent, as a smaller area would not be manageable.

All this is subject, of course, to the parties not specially agreeing otherwise[5].

The Bavarian law[6] contemplates the extinction of any right,

[4] Eling, pp. 135-36. Certain rights can only be compensated in certain ways—some with money, some with land. It is not necessary to enter on this.

[5] The object here, it will be observed, is to give the grantee a chance of providing himself the land granted with material for his right If it is his grazing that is compensated, the land must be fit for meadow or for tillage, so that either he may grow fodder or grass, or take to agriculture and sell his cattle. If he wants wood or dead leaves, he can get it still from the forest tract made over to him, or he can sell the wood and so find funds to buy other manure.

[6] See Roth., p. 325. This compensation is, in fact, like our Indian provision for the exercise of rights in another piece of forest, only we do not include that as a question of compensation, because the right is provided for but not diminished in any way. I confess the Bavarian law is not very clear to me, unless it is intended that the abretung or cutting off of the bit of forest does not confer the proprietary right of the plot. For, if it did, it would surely be very much more than adequate compensation. The land is still to be of sufficient extent to provide for the right, not, observe, to yield a produce or possess an intrinsic value equal to the value of the right, which is quite another thing.

whether wood-right, leaf manure, or other, by cutting off a bit of forest; but this is not valued as in the French law: it must be a piece free of rights of third persons, capable of being kept up as forest, and sufficient to supply the right. Money compensation may also be awarded apparently in *State* forests for any right.

The Saxon law mentions the same methods of compensation[7]. The right-holder chooses which he will have, and may take partly one and partly the other.

The rights to be compensated must all be defined (if not defined already by the terms of the grant). Averages of 12 years past, exclusive of years of famine or other exceptional circumstances, are taken as the basis for estimating quantity and number. Moreover, it is the defined right, as regulated by what the forest can bear, that is valued and compensated[8]. The Art. 130 of this law is worthy of special attention, on the subject of granting land in compensation. This is just the principle which I suggest as being fair and equitable to be followed in our Indian practice:

"The plot of land given in compensation must be in extent, situation and capability, such that the grantee can get off it a yield (whatever it may be in kind) equal in value to the calculated value of the right as heretofore exercised in the forest area to be freed."

§ 7.—*Under Austrian Law.*

The Austrian law[9] mentions a similar compensation. Where money is given, it is at the usual 20 years' purchase of the annual value of the right. Land is apparently given only where the right-holder is a community, or when several right-holders form themselves into a joint body to take up the management of the land granted[10], the idea being apparently that the land grant will be worked as forest, but with the express object of providing for the right,

[7] Law of 17th March 1832, Art. 29, Qvenzel, p. 216, *et seq.*

[8] *Id.*, Art. 127—"bei ordnungs mässiger und wirthschaftlicher Benutzung."

[9] Kais. Patent, 5th July 1853, Arts, 27—30, &c.

[10] See Art. 30 in Grabner.

and that a private owner would be likely to fail in doing this, more so than a body which survives beyond one life.

§ 8.—*Under Italian Law.*

The Italian law[1] as usual following the French, proposes either a piece of the forest to be given in compensation, or a money sum. Disputes about the extent of land, or the amount of compensation in money and other questions arising, are to be settled by the ordinary Civil Courts.

§ 9.—*Under English Law.*

The English law authorities, under the different "Enclosure Acts," do not afford any principles which I can quote as offering useful suggestions in Indian practice. Under the Enclosure Act of 1845, a Commissioner is appointed who hears both sides, and then values the rights established: the land is then devoted partly to "enclosure," while the rest is devoted to being divided out in plots given as compensation for the rights extinguished in the rest.

Petty rights, which would require fractional allotments of land in compensation, are paid for in money. The English Acts, it must be remembered, do not only, or even chiefly, relate to taking up lands for *public* forest purposes; consequently, the question does not arise whether, having cut off portions of the land for the compensation of the right-holders, the remainder is of such size that it can be managed to any useful purpose, or "maintained" as forest. This fact alone renders the provisions little likely to suit Indian Forest Settlements.

§ 10.—*Analogy of other Indian Laws.*

Lastly, under this head I have referred to the Indian Land Acquisition Act (X of 1870), without finding anything that throws light on the practical determination of compensation.

[1] Law of 1875, Arts. 3 and 4. The land is either given in full right or with a "titolo enfiteutico"—an "emphyteusis," or grant of absolute user and enjoyment, with the reversion only of the bare ownership in the soil to the original owner.

The Act, it is true, contemplates rights, not being rights of ownership in the land, being compensated; but these rarely or never appear or require to be dealt with in practice under this Act. Nothing is therefore prescribed as to any principle of annual valuation, or of capitalizing such value. The "market value"—whatever that may be—in such cases is alone alluded to as a standard.

§ 11.—*Principles deduced which may be applied to Indian practice.*

If I may gather some general principles from the above illustrations of different laws, I can only do so by way of suggestion. The practice of settlements and the decisions which will in time accumulate, will be the only means of getting at any authoritative rules.

I would suggest that, for money compensation, a yearly value of the right, as defined and as regulated, and then capitalized at 20 years' purchase, will be in practice a fair standard.

Money will usually be given where it is an efficient substitute; as when the possession of an income will furnish the means of *buying* what the right provided, or was intended to provide, under the former state of things. Money, for example, is said to be a good compensation for rights to leaf manure (streu), as it furnishes the right-holder with the means of buying manure, or otherwise improving his cultivation [2]. Money is, of course, a good compensation in all cases where the right is to dig sand, collect produce, &c., for sale: the money is the exact equivalent to the average profit made.

It must be for the Settlement Officer to consider where this is applicable. I suggest that in all cases a yearly payment is far more useful to the people, even if it is a little more trouble to the authorities. A lump sum will be spent and gone, without doing any real good, in nine cases out of ten.

A land grant of such size or value as the Saxon law prescribes will often be the best compensation to an agriculturist.

[2] vonBerg, p. 231.

Under our law, no question can arise about the necessity for its being forest, or for its having the capacity to supply a special forest produce to satisfy a particular right.

Rights that can be provided for in kind, in a bit of the forest excluded from the reserve or forest estate settled, are not, under our system, held to have been commuted or compensated; the site of their exercise has been shifted—perhaps very slightly so; the soil of the part cut off remains the property of Government, but the produce of the tract is exclusively devoted to the supply of the right.

When, therefore, a grant of land is made in compensation for the right, it is in full proprietary right as a valuable property; all that is looked to is that the land is really valuable; at least to the extent of the value of the right, as far as it can be estimated. It is no use offering a man a bit of salt or useless land on which nothing will grow; but if it is cultivable land, he takes it and does what he likes with it. He may grow crops and make money, or he may turn it into meadow or grow roots or fodder, and so feed cattle that otherwise he would have required forest grazing for, just as he pleases. It may also induce him to give up cattle-breeding and take to agriculture. The diminution of pastoral industries and the encouragement of agriculture is always a great object in countries where the forest area is small and the rainfall scanty.

The wishes of the receiver of compensation should of course be consulted as to which form compensation should take. The Indian Act leaves the discretion to the Settlement Officer[3]. The Burma Act expressly says that land is given if the right-holder consents, *i.e.*, if he does not wish for land, he is entitled, of right, to get money compensation[4].

SECTION VIII.—EXTINCTION OF UNCLAIMED RIGHTS.

Before passing on to the final steps of the settlement, I must

[3] Act VII, 1878, sec. 15 (last line of the section).

[4] Act XIX, 1881, sec. 15.

notice that, having now dealt with all admitted rights, and either (*a*) provided for them *outside* the forest, or (*b*) left them properly regulated *inside* the forest, or (*c*) having bought them out altogether, no other rights can by any possibility remain in existence, in the background as it were, to give rise to future question.

The law gives the amplest opportunity to people to claim their rights, without any formality or bar in the first instance. They may come and make any verbal representation they please; both Forest Settlement and Forest Officer are on the spot and are accessible. Not only so, but the Settlement Officer will himself endeavour to find out if any rights not claimed, exist; he will act as the next friend of ignorant or timid people, and find out their rights for them. It is, of course, practically impossible that the wants of the people, and such claims as practically amount to rights and would be equitably recognized as such, should remain unknown. If they should, then such rights are declared to be extinguished[5]. This is absolutely necessary, and is in accordance with the jurisprudence of all modern nations. No forest would be safe, and no repression of trespass or other offences in future would be possible, if unsettled rights remained for ever looming in the background. The only possible plan is to take every precaution that all rights are ascertained, and having done everything that is possible in this respect, to declare that no rights not brought to light can be held to have any legal existence.

The law makes due provision for any accidental delay in presenting claims; as long as the final notifications have not actually been issued, any delay, reasonably accounted for, is overlooked, and the claim entertained and disposed of (Indian Act, section 9; Burma Act, section 19).

And further than this: to obviate any possible injustice, the local Government is always vested with a certain power (sec-

[5] Supposing them ever to have existed. This phrase is the most practically convenient. It might have been said "shall be deemed not to exist," but this would be awkward.

tion 21) of revising arrangements, which power can be exercised within a limit of five years from the date of the final notification. It is obvious that no case of hardship could escape the embrace of such ample provisions.

SECTION IX.—APPEALS FROM SETTLEMENT ORDERS.

It will be observed that *all* orders passed by the Forest Settlement Officer regarding the definition, regulation or commutation of rights, as well as orders regarding claims to land inside the proposed forest, are open to appeal.

The appeal may proceed from the right-holder or claimant, or be on behalf of the forest-owner—the Government; in which latter case they are to be lodged by any person "generally or specially empowered in that behalf" by the Government (Act, section 16). In the Burma Act (section 16) this provision has been omitted. It was thought sufficient to let the appeal be only on behalf of the claimant. If the Government forest officer sees anything wrong, it is sufficient that he make the necessary official reference and the power of revision vested with Chief Commissioner will enable him to correct any errors.

Three months is the limit for appealing.

Appeals must be in writing and are to be delivered to the Forest Settlement Officer who forwards them. The appellate authority is a Revenue Officer especially appointed, of rank not below a Collector or Deputy Commissioner.

The appeals are subject to the same procedure as ordinary revenue appeals.

A special Forest Court may (under the Indian Act) be appointed to hear appeals; but this provision has not as yet been acted on.

Such a Court would only be necessary in cases of special complication and difficulty, and the appeal is then to be heard somewhere near the forest, so as to admit of local investigation if necessary.

Besides the power of appeal, it is open to Government to revise the orders passed—

(*a*) by the Forest Settlement Officer in respect of settling rights under section 14, directing that any other method of providing for the settlement under the section than that adopted be preferentially followed, or directing that commutation under section 15 be substituted;

(*b*) any order passed in appeal. Such revision may take place at any time within five years after the *final* notification has been published[6].

SECTION X.—NEW RIGHTS CANNOT GROW UP IN A RESERVED FOREST.

§ 1.—*Provisions of the Indian Law.*

I must offer some remarks regarding an important provision of the law found in section 22 of the Indian Act (section 22 also of the Burma Act)—

"No right of any description shall be acquired in or over a reserved forest."

This provision cannot take effect until it is definitely known by the operations of settlement what *are* the respective rights of the State and of private persons, and how they have been adjusted from a given date. That ascertained, the forest is declared "reserved" from the fixed date, and no right which on that date has not been admitted and recorded is held to have any existence. Then it is possible to say that thenceforth no new right can grow up, nor any process of prescriptive growth go on. It is all cut short, so to speak, on the date of declaration.

It is obvious also that this provision can have no meaning except within the definite area indicated by demarcation as the reserved estate.

[6] Indian Act, section 21. It will be observed that section 17 also gives a power of revision to the appeal order. Both these sections are not necessary, and the first is omitted in Burma Act.

The Indian Act would probably be interpreted to mean in this respect exactly what the Burma Act expresses.

§ 2.—*Continental Laws.*

All the continental laws contain similar provisions. It is not, however, necessary to go into the specific provisions[7].

The Indian law excepts the obvious case where the right passes by succession: but then it is not a new right, but an existing (and necessarily settled and recorded) right which passes on from the right-holder to his heir. It is also reserved to the Government to grant a *right* exceptionally; but I know of no case in which this has ever been done.

§ 3.—*Question of Rights to New Comers and increased number of Inhabitants.*

Connected with this subject is, however, a point to which some attention must be given. Very commonly in settling Indian forests, the rights required are by *the inhabitants* of a certain village.

A grazing right will frequently be recorded in the form that such and such a village is to get grazing for so many cows, so many buffaloes, and so many goats, or that such and such a village has the right of taking firewood for so many houses. Such villages may afterwards increase, and additional cattle be brought in, or additional houses be built.

Under the provisions of the Indian law, such additional houses and later settlers could not claim any right; nor can the numbers and quantities fixed at settlement be legally increased, except by an express grant of the local Government[8].

[7] For example, the Code Forestier, Art. 62: "No concession will, in future, be made, in State Forests, of any rights of user of any kind, and under any pretext whatsoever."

[8] This matter has had a greater importance in Europe where rights are dependent, much more on distinct seignorial grants of ancient date, than is the case in India. Here then the terms of grants have to be considered. Now, supposing a grant has been made to a "commune" *as a body*, every one who has rights as a member of the commune (not merely as a resident or settler) as it may exist at any given time, participates in the right. This point is elaborately discussed in Meaume; and all the different views are given. The *question of the true intention of the grantor* is at the bottom of them. (Meaume, I, note, p. 289).

This discussion is cut short by the German law, which restricts a right granted to a commune (*Gemeinde*) or a village (*Portschaft*) to the actual members of the

It may be convenient in this place to notice that while new rights cannot grow up by any process of prescription, &c., Government can by specific grant create such rights. It is, however, very unadvisable to tie the hands of the public authority by granting a right, which, once granted, is irrevocable. When it is desired to make provision for some hard case it is better to grant a "license"[9] worded so that the Government may at any time revoke or alter the terms. When such a permission (which the French call "*tolérance*") is granted, it should define the number of cattle to be grazed, the kind, the season of grazing, the quantity of wood, and in fact all other particulars exactly the same as would be done in the case of a right regulated for exercise inside the forest.

It should also be remembered that all concessions to extract minor produce, surface minerals, or anything else of the kind, are really temporary and revocable rights while they last, and should, in all cases, be exactly defined, and always declared to be exercisable subject to control of the forest officers, and to be immediately terminable in case any breach of condition occurs.

The French practice in this respect may afford useful suggestions to the Indian forest officer[10]. A "*tolérance*," granted for the

community, not to laborers, and residents not being members, and to such number of members only as existed at the date of grant (Eding. pp. 109, 110, and authorities quoted). If it were otherwise, it might come to pass that a forest would be perfectly swamped by the right. A grant to a commune with, perhaps, twenty houses for firewood might grow to one that required the whole coppice yield of an estate.

In India the forest rights rarely or never originate in a grant, from which any intention can be inferred, as to a design to encourage more settlers and so forth. Rights grew up out of a mere long-continued and openly exercised practice of the inhabitants of villages in the vicinity, to go into the forest and graze and get what wood they wanted. Hence the number as found in actual enjoyment of the practice at the time of settlement is the obvious standard. After that new additional rights cannot grow up.

[9] I have already explained the objections to the term "privilege" which some readers would be disposed to apply in this place.

[10] See Service Administratif des Chefs de Cantonnement; par A. Puton (Grosjean, Nancy, 1870), p. 198, &c.

convenience of certain persons, which is not intended to be a fixed right, is conveyed by a written instrument holding good for *nine years*, and stipulating that the concessionaires shall pay a *nominal* rent or charge which prevents the idea of a permanent grant of a right. It can be renewed as often as the authorities please at the close of each ninth year. The Prefect grants these "*tolérance*" with the advice of the Conservators. The conditions attached are—

(1) that the concession is always revocable at pleasure (and cannot militate against any pre-existing rights of third parties, for which the Government is in no way responsible);
(2) the term of years (nine or some less number) is fixed;
(3) the yearly charge is to be paid (as above stated);
(4) the concessionaire is responsible to make good any damage caused in the exercise of his concession;
(5) when the concession comes to an end (in whatever way) the grantee engages to restore the locality to its original condition, whenever that is necessary, within a month, or to allow the forest officer to do so and to pay all charges.

The concessionaire signs an agreement that he accepts the terms and will abide by them, and failure to sign this in due time entails cancelment of the concession.

Such temporary concessions most commonly (in France) refer to a right-of-way, permission to use a spring or other water, to take a water channel across forest land and so forth.

In a few places in India leases of bits of forest are sometimes given with right to raise crops for a certain number of seasons conditional on raising in lines between the crops certain trees.

In practice these do not lead to much as a rule. But the plan is also known in France (*concession à charge de repeuplement*)[1]; the

[1] Serv. Adm., p. 211.

concession is made after preparing a plan of the land and issuing a public notice, since in France such concessions are made not by private bargain but publicly by a sort of auction (*adjudication publique*).

SECTION XI.—FINAL NOTIFICATION OF FOREST.

The close of the proceedings is marked by the issue of a final notification under section 19. (Burma, section 18).

When all claims have been heard, appeals decided, or when the periods allowed in each case have lapsed, then nothing remains but to notify definitely the exact limits of the forest, as in future they will remain (for the limits originally entered in the *preliminary notification under section 4*, may have been altered in the process of settlement), and to declare that from a specified date the estate so demarcated is a "Reserved Forest," and therefore subject to the provisions of the Act.

The Forest Officer (and in Burma the Deputy Commissioner) is bound, before the date so fixed, to cause a translation of the notification to be published in every town and village in the neighbourhood of the forest[2].

SECTION XII.—PERMANENT CHARACTER OF RESERVED FOREST.

A reserved forest once so constituted cannot be alienated or devoted to any purpose without the *previous express sanction* of the Governor-General in Council; and if it is determined for any cause to strike any lands off the roll of reserved forests, rights extinguished do not however revive in consequence[3].

It will be observed, however, that the local Government can grant rights or licenses under section 22, so that practically a good deal of change can be introduced (as for example allowing "kumri" or "toungya" cultivation) in a reserved forest without action under section 26. (Burma, 29.)

[2] Indian Act, section 21; Burma Act (XIX of 1881), section 20.

[3] Indian Act, section 26; Burma Act, section 29.

SECTION XIII.—FORESTS RESERVED BEFORE THE ACT.

A few words with regard to section 34 of the Indian Act (Burma, 30) may here be added.

When the latest Acts came into force, it was necessary to say what was to be done with those forests which had been already "Reserved" or made "Government Forest" under the Act of 1865 or local rules.

In Burma, it was well known that all existing reserves had been formally demarcated under a procedure closely resembling that prescribed by the Forest Act of 1881, consequently it was sufficient to prescribe in section 30, that all forests previously reserved, might be treated in all respects as if they had been reserved under the Act itself. But in the several provinces of India, the older procedure in constituting "Reserved" or "Government" forests had been too various, and some cases too imperfect, to admit of the Act making any general declaration that what had been done before was to be taken as if done under the Act. Section 34 of the (Indian) Act consequently provided that Government should within a fixed time consider the matter, and gazette the forests accordingly. Where the Government thought that there had been a sufficient settlement and record of rights, these rights would remain as recorded, and the forest would be "Reserved" under the Act. Where the Government was not satisfied that a proper settlement had been made, then the declaration that the forest was reserved would still be issued, but the law provided that the declaration would not not abridge or affect any rights not settled. A question has arisen in Bombay, and possibly may arise elsewhere, as to the consequences of this section, where, in the course of settlement, it is decided by the Settlement Officer that land hitherto included in the old reserve is private property. I think in that case that no sanction of Government under section 26 is needed, for striking the lands so declared off the list of Reserved Forest, for when the declaration under section 34 is made, and it is expressly ordered that the land is reserved *subject* to a settlement of rights, it is clear

that the whole of the forest has not legally become a reserve without exception; all those included lands (or perhaps the whole forest area in some cases) which are private property and turn out to be so when the Settlement Officer enquires into the matter, were never affected by the notification which declared the forest generally to be 'Reserved.'

SECTION XIV.—FINAL DEMARCATION.

§ 1.—*Object of Demarcation.*

I reserved this subject to the last because a final and permanent demarcation is not usually made, or at least not made on all points, till the boundaries are placed beyond doubt by the termination of the settlement.

It is hardly necessary to remark that it is essential for all the objects of a forest estate that the boundaries should be known.

It is not possible to punish people for trespass and mischief unless they can certainly know whether they are inside the reserved forest or not. The special provisions of the law, as far as they relate to the protection of estates, must necessarily operate within certain definite limits.

So with the settlement of rights and the prohibition to their acquisition; it must be over definite areas that the rights have been settled, and within which new rights cannot be acquired[4].

[4] It is interesting to observe how the early forest writers appreciate the demarcation of forests. Here is an extract from Manwood (page 129):—

"It is most necessary that the very true meets and limits of the forest should be known unto all men, and most especially to those that are the officers of the forest, and that, for many causes: for, if a man be prosecuted for the killing of a wild beast of the forest, the place where the same was killed is very material to be known; for, although that the same were a wild beast of the forest, yet if that it were killed out of the forest, which in some sort may be done, and yet no offence to the forest laws; and therefore the limits and bounds of the forest are especially to be known. And also when the 'regarders' do go to make their view of the forest and to see the spoil of the woods and coverts, and of all such articles as they are by their office and oath charged to view and enquire of, there the limits and bounds of the forest must needs be known unto them, for otherwise they may deal with matters that are dehors

There is nothing in the Act which requires that any particular form or method of demarcation should be adopted. A forest may be clearly "meted and bounded" by natural marks, such as a steep cliff, a river, a distinctly marked ravine or glen, or the crest of a ridge. A permanent metalled road, a railway or a canal may also serve as a line of boundary.

Boundary pillars may not then be required except one here and there to carry serial numbers. Trenches, continuous or interrupted, are often used as boundary lines. And in dense jungle countries cleared lines are the most efficient and satisfactory.

In any case the boundaries must be easy to ascertain. It is not right to punish people for trespass when they cannot really tell whether they are inside the reserved forest or not; when, given one pillar, it is only possible for a forest official or an expert to tell in which direction to find the next.

Pillars or marks should always be made to carry serial numbers[5]; hence some marks of the kind are necessary even when the boundary line is also indicated otherwise.

Unmetalled roads liable to deviate or be obliterated, trees which may be blown down or cut down should not be adopted as permanent boundary marks[6]. This is of course speaking generally and on principle. There may be localities, as in British Burma, where in

and out of the forest, and that they may not do." See also Manwood's definition of a forest given at page 84 *ante*. In the edition of 1665, the words are "meet" and "meeted;" in the edition quoted in "Williams on Rights of Common," they are "meers" and "meered."

[5] A most essential practice. The pillars can then be identified on the maps; and guards going on their rounds and discovering a broken pillar, or the fact of some encroachment, can at once report the fact with reference to the boundary numbers. So fires and other offences can often be at once localized by aid of the numbered pillars.

[6] This is prescribed also in the Prussian practice (Eding, p. 83 *et seq.*,) and in Saxony (Qvenzel, p. 181). The Prussian law objects to all tracks, footpaths, and small streams, as they are liable to change their courses and are uncertain.

It is also recommended to bury charcoal, fragments of pottery, &c., under the pillars, so that if the pillar is destroyed the site can be afterwards established beyond doubt.

our present stage of management, boards painted white and fixed to trees at intervals along cleared and off lines are very efficient marks.

§ 2.—*Preservation of Boundary Marks.*

In the Revenue Manual[7] I have indicated the provisions of the revenue law regarding the maintenance of boundary marks when they happen to form boundaries between forest and revenue-paying land, and are consequently under the revenue law.

Wilful damage to boundary marks can in any case be punished under the Indian Penal Code[8], and also under the special provisions of the Forest Act, section 62. (Burma 62).

Forest boundary pillars often stand entirely in the forest, or between it and Government waste land, so that the cost of erecting them and of repairing them afterwards is borne by Government. But it may be in some cases that the pillar is between a revenue-paying estate and Government land, and then it may come under the Land Revenue law (or the Bengal Survey Act), and the district officer may have jurisdiction to apportion the cost of the marks.

§ 3.—*European Law regarding Boundary Marks.*

The continental laws all contain rules for the determination of boundary lines and their indication by boundary marks. In these countries, however, forest property of the State is nearly always contiguous to some private property, because the whole area of the country is occupied, and not as in India, partly waste. The provisions of the law are therefore different.

In France either the State (forest proprietor) or the neighbours may demand that a boundary may be determined and laid down. Disputes about it are carried to the Civil Court. A written record of the proceeding (*procès verbal de la délimitation*) is pre-

[7] Book II, Chapter IV, section 3, &c.

[8] Section 434.

pared and deposited[9], much in the same way as a 'thákbast misl' is in our own land settlements.

The Italian law refers to all forests (no matter who they belong to) when found on mountain slopes up to the limit of the growth of the chesnut; and above that if they are of a protective character. All forests under the law up to the limit mentioned, and all that in other positions are specially exempt, must be permanently demarcated (*siano segnati i confini con termini inalterabili*), and descriptive registers of the boundaries are prepared[10].

The German laws provide that either of two neighbouring estates can claim to have the boundaries fixed and indicated by permanent marks (*feste erkennbare zeichen*)[1]. Under this rule the State forests can of course be (and are) demarcated.

[9] Code. For. Arts. 8—14; Curasson, Vol. I, p. 149. There are some further details about laying down part of a boundary or proceeding to the whole estate, which I do not think it necessary to enter on.

[10] Law of June, 1877, Art. 1, and Royal decree for its execution, Arts. 17—19.

[1] Qvenzel, p. 167, and regarding record of the boundaries, p. 98.

CHAPTER VII.

VILLAGE FORESTS.

§ 1.—*Object of the Chapter.*

It is not to be supposed from the title of Chapter III of the Forest Act that we have yet in India a class of forests which are naturally, or according to existing law or custom, the property of a village community, a town, or a public institution. But it was thought that such a class of forests might be usefully contemplated, or looked forward to, in the provisions of the Acts. It would accord well with the institution of village communities, which the reader of the Revenue Manual will have heard about. It will probably be found a useful means of securing the existence of forest where circumstances have given the villagers in a given locality such a hold on the forest that there would be practically no object in managing it for the benefit of the State at large, though its proper management and preservation for the village might be of great importance.

I have little doubt that, in the course of time, village forests will become an important feature in the agricultural economy of the population in many parts of India. The constitution of them is, however, a matter *to be* effected. The student will not suppose that such forests as yet exist, as they do in France and Germany. The Indian Act at present only contemplates that the local Government *may* create such forests by settling the lands as reserved forest in the manner described in the preceding chapters, and then assigning its rights to the village. Rules may then be made prescribing how the forest is to be utilised, and what duties the village has for its protection and improvement. The Government is left thus with a wide discretion either to assume the management itself, or partly manage it; or keep its management under control and supervision

§ 2.—*Provisions not effective.*

The provisions of the Indian Act, however, do not suggest a probably successful mode of providing for the creation of such forests.

Section 27, it will be observed, only enables village forests to be made out of lands already constituted reserved forest. But village forests would probably be most wanted in cases where a bare proprietary right belongs to Government, but where the rights of the village are already so extensive that Government could not conveniently carry out a settlement of the rights under Chapter II for *the public* benefit. The chapter could only be useful, on the understanding that the settlement is to be carried out and the rights arranged for in the forest, and claims to land (section 10) got rid of, when they conflict with the interest of the *village* which it is the intention to assign the forest to. This, however, ought to have been expressly stated in the Act, not left to inference.

I think, however, that to make the best of the Act as it stands, it might be admissible to carry out the settlement under Chapter II on this understanding: and so, if the *soil* itself belonged already to the village the claim under section 10 (to the soil) would be recorded in favour of the village, and only those interests in the soil disposed of, which were opposed to the village interest, as either of outsiders or else individual rights of residents, adverse to the village body as a whole. In other words the Chapter II would be understood, *mutatis mutandis*, and that the settlement of rights would be on the interest of the village body as against individuals, and not as the chapter is worded, in the interest of *the State*, against individuals or communities.

§ 3.—*Provisions in Burma.*

In the Burma Act, the chapter on village forests has avoided these difficulties. It is so drawn that any land which is at the disposal of Government may be made a village forest: rights already existing in favour of the village would be no obstacle,

and a settlement of rights, where necessary, can be ordered under the usual procedure. Such settlement may be made in the interest of the village, either with reference to rights *other* than those of the village, or with reference to certain rights of individual villagers which are adverse to the interest of a body as a whole as may be necessary[1].

§ 4.—*Points to be settled.*

In settling village forests, the points to be looked to will be chiefly—

(1) to arrange for a portion of the forest being always closed for reproduction, or to allow young growth to come on undisturbed by cattle;

(2) to restricting and, if possible, removing destructive rights, such as collecting dead leaves for manure, scoring or ringing trees for resin, excessive lopping, &c.;

(3) to provide for grazing in the open portions;

(4) locating the cutting of brushwood and inferior trees for fuel and fencing purposes;

(5) fixing the number of trees to be cut in each year for building and other purposes, leaving the villagers to distribute this yield as they please, assigning it to household, establishments, &c., or selling it as may be most convenient.

The detail of this, however, belongs to a treatise on forest management.

§ 5.—*Communal Forests in Europe.*

I shall here proceed to describe the European laws regarding village or communal forests, as they may in time to come afford useful suggestions for our own guidance.

[1] It may be that the inhabitants have each some specific rights which need to be defined and regulated, while the balance of the forest-yield remains to be applied to the common profit.

remark that all these laws contemplate, to a greater or less extent, the right of the Government to control the management of such forests: and I would observe that if this is found necessary in countries which are completely civilised, it is even more so with the ignorant peasantry of India. Private owners, and even communities, are prone to look to the present and to desire to make an immediate profit, without thinking of the future: the State being imperishable, is free to a large extent from this temptation. It is obvious that this and other considerations, forcible as they are in any country, are more usually applicable to India, where there is so much ignorance and backwardness in all matters relating to general economy.

§ 6.—*In France.*

In France, communal forests and those belonging to public institutions, are, equally with State forests, under regular conservancy and subject to the Forest law (Code For., Art. 90). This refers, not to little patches of woodland, but to lands of sufficient extent to be manageable as forests. Wherever it was a question whether a particular piece of wood land was suitable for forest management, it was determined on the basis of a proposal of the Forest Department, which was discussed with the Municipal authorities or the guardians of the public institution concerned. When the forest is once recognized as such, it must be worked methodically.

All proposals for change in the plan of working or in the method of disposing of the material, all proposals to manage some of the lands as pasture, or to put others under wood, must come from the Forest Department and be submitted to the Municipal authorities as before. If they cannot agree, reference is made to the "Conseil d'État." No clearing of the forest (completely) is allowed, without the express approval of Government (Code For., Art. 91). Nor can partition be allowed, except where two or more communes may have shares in one forest and desire to separate them. Both these provisions should most certainly be applied in India. The former indeed, if Chapter II is applied, is provided

for in so many words. Partition is not expressly mentioned, but it can always be provided against by rules made under Chapter III. It would defeat the object for which these forests were constituted, if the forest were broken up and each headman, or the holders of a "patti" or section of the village, were allowed to regard a specific portion of the forest as exclusively his or theirs, nor would any forest management be possible.

All cuttings have to be made according to a plan of operations by the regular agency. No irregular cuttings on the part of the community are allowed (Code For., Arts. 100-103).

The building timber as well as the firewood in stacks has to be regularly cut, prepared, and handed over to each person entitled, in the proper quantity. Sales of the produce of the forest not required by the inhabitants for their own use, are conducted, just as in a Government forest, in the presence of the Mayor[2].

A useful provision is also made for keeping in reserve, to meet unforeseen contingencies, a certain portion of the wood that might otherwise be cut. Such a plan could only be applied in detail in India, with reference to local conditions.

As regards *establishments*, the forest guards are appointed by the Mayor and Municipal Council, but the nominees must be approved (agréés) by the Forest Department. If there is a difference of opinion, the 'prefet' decides. The same guard may have charge of a 'canton' of a State forest and of one in a communal forest, but in that case he is appointed by the State.

Communal forest guards are in all respects under the same rules as State forest guards (Code For., Art. 99). They take the same oath and have the same powers as regards making written reports of offences and other matters transacted under their own

[2] In Meaume, Vol. II, §§ 497-588, an elaborate *exposé* of Art. 105 of the Code is given regarding the method of distributing firewood to the inhabitants, so much for each hearth (unless there is an express right otherwise), the method of giving timber for repairs and building, and so forth. It would not be useful, in our present stage in India, to go into any detail regarding these provisions.

observation, and these reports have the same value as *primâ facie* evidence in court.

The communal guards are under the orders of the superior staff of the State Forest Department.

As this supervision costs the State something, Article 106 of the Code provides that the State is to be recompensed by a payment of one-twentieth (or five centimes in the franc) of the sale value of all forest produce, principal and accessory.

Products delivered or used in kind are valued, and one-twentieth of the value is paid into the treasury

Besides this, the commune pays the salaries of the guards. But beyond these two items, the State makes no other charge for supervision, for survey, &c., nor any charge for conducting cases and prosecutions in court, since if fines and compensation are recovered, these go to the State[3].

The salaries of the guards and their payments to the treasury form a first charge on the income from the sales of the yearly fellings (Art. 109). When all the material is used by the commune, and the commune has no other resources, a portion of the yield must first of all be deducted and sold by auction, sufficient to meet the charges, before the rest is distributed.

All the provisions of the Code relating to the regulation of rights, their commutation, the prohibition against grazing goats and sheep, and so forth, that are prescribed for State forests, apply equally to communal forests (Arts. 110-112).

I have dwelt at this length on the provisions of the French law because many of these rules may usefully be adopted in Indian practice, and are indeed admissible under the Act.

It is also certain that we shall have to adopt the plan of State management, though the nomination of the guards may be left to the villages, subject to the approval of the Government officers as in France.

[3] See Articles 107-8 (Code For.)

§ 7.—*In Germany.*

The German States do not all follow the same plan. In some the State manages as in France; in others it only exercises general supervision.

In Bavaria, for example, the supervision (*curatel*) extends to the following matters—[4]

I.—Without the consent of the Government such forests are not sold, leased, mortgaged, or otherwise alienated, nor can a partition take place.

II.—Forests cannot be cleared or converted into meadow or arable lands either wholly or partly.

III.—To seeing that the forests are worked properly, not wasted; that blank places are stocked and restored; that extraordinary fellings do not take place without special sanction.

IV.—To the audit of accounts.

Under the third head is included the duty of seeing that there is a suitable plan of operations on record[5] and that it is properly carried out; that proper precautions are taken to protect the forest against natural calamities as well as forest offences.

In all laws, as in France, partition is forbidden[6].

The commune has to provide the protective forest staff. It also appoints those who manage the local forest operations, but must select persons who have passed the necessary forest examinations.

The superior forest inspection and control is supplied by the State officials. The Government bears the cost of this, but the commune pays all expenses of local management, working, and protection.

[4] Roth, § 83, page 68. The Saxon law is similar. The State has only a "certain supervision" (*eine gewisse überwachung*) *Qvenzel*, page 7).

[5] Which also involve seeing that rights are properly settled and regulated, that attention has been given to making the yield continuous and perpetual, and such as is most in conformity with the wants of the community or institution.

[6] So in Austria (Law of 1852, Art. 21).

CHAPTER VIII.

UNDIVIDED OR SHARED FORESTS.

(SECTION 79, INDIAN FOREST ACT.)

§ 1.—*Forests really shared.*

The 79th section of the Indian Act contemplates, primarily, forests which are really the joint property of the State and some individual, or perhaps a village or community. This is just like the "forêt indivis" of the French law[1]. Under that law, whenever the State or a public institution or a commune has an undivided share in a forest with private individuals, this forest is under the forest *régime* and the State appoints the guards, and in fact manages the estate, accounting to the co-proprietor for his share of all proceeds.

In India these cases are not common; they have only, as far as I know, arisen in the Kalesar forest in the Ambála district of the Panjáb[2], and are now illustrated in Bombay by the Khot villages.

§ 2.—*Other analogous but not identical cases.*

But the 79th section also includes another class of forests in which the whole property is not shared, that is to say Government has no joint right in the property—soil and products, but the soil may belong to an individual or a body, and Government may be entitled to all or some of the produce,—trees, grass or money profits. So that this section can be applied to introduce the procedure under Chapter II, where that procedure, as already explained, could not otherwise be adopted.

As the conditions under which forests coming under this section are various, and not in all cases well defined, a wide discretion

[1] Code For., Art. 113, &c.

[2] In this case the Government succeeded, owing to failure of heirs to the original owner, to some undivided shares in the whole estate. This then is a genuine "forêt indivis."

has been left to Government, and it will be lawful either simply to issue regulations for the management of the estate, to be observed by the other party who is left in charge of the estate, or to undertake the management, accounting to the other party for his interest.

When Government does this, it may either formally constitute the estate a forest under Chapter II, or extend a certain protection to it under Chapter IV. The latter plan ought not to be adopted if the forest is permanently to remain such.

It seems to me quite clear that, though the section allows of *any* of the provisions of Chapter II being applied,—*i.e.*, all need not be—there will rarely be any occasion to make any exception, if the interpretation I have before suggested of Chapter II is admitted. To repeat this once more, it is, that whereas the Chapter II primarily applies to settlement of lands which are to be State forests, the wording is directed to the settlement of claims to land and rights adverse to the State, whereas in applying it to settling lands that are intended to be mainly or wholly for the benefit of communities, the chapter may well be complied with by settling those rights only that are adverse to the community.

For example: in the Kangra forests of the Panjáb it is held that the soil belongs to the people, and the people may graze and take what wood they want for firewood and for building, on certain terms; but apart from that, the timber trees belong to Government; and consequently (which is frequently overlooked), Government has the right *to the use of the soil to support the trees so long as any trees remain on it.* Moreover, Government has the right to control the forest, and has always established this by making and enforcing rules. Government has also the right to keep one-third (tiháí) of the forests closed for reproduction[3]. Here then is a case in which

[3] These rights in Kangra are clear from the old Forest Rules of 1860. Unfortunately the rule for closing one-third has not been carried out as intended. Instead of changing the site of the closed third as the rule describes (see rule 22 of the Kangra rules under the general rules of 1855, which have the force of law), the tiháí at first closed has been kept up ever since, so that this has got to be looked on as a permanent thing, instead of a series of thirds being closed in rotation.

the soil is vested in the villages, and the produce rights are undivided between the State and the villages, the State having never given up its right of control; and the way to constitute this a permanent forest estate would be to proceed under section 79 (*c*) and Chapter II together, in the manner already described in Chapter II, sections 3 and 4[4].

In Bombay the section would be applicable chiefly to forests in villages held by khots. The nature of the khoti tenure will be found described in the Revenue Manual, page 589. It was for a long time doubtful whether the khot was entitled to an occupancy or proprietary right in the forest and waste inside his "khot" or not, He claimed it, and Government did not assent. Ultimately a compromise was arrived at.

An Act of the Bombay Council (I of 1880) has been passed dealing with the rights of khots, and opportunity was taken to introduce a section which runs as follows:—

Government may constitute uncultivated land a reserved forest.

41. And whereas it is necessary in the general interests of the people to enable Government to promote the extension of forests in villages held by khots, it is hereby enacted that Government may at any time constitute any uncultivated land in any village to which this Act extends, or may hereafter be extended, a reserved forest. But nothing in this section contained shall derogate from any rights conferred by any sanad or other grant made by any lawful authority.

[4] Here it may not be inadmissible in a note to remark that in the Kangra forests, and often in jointly owned forests, there is a tendency in individuals to look upon plots of the forest as their own; to get up, in fact, by lapse of time and sanction of tacit acquiescence, a sort of irregular *partition* of the forest. This is unauthorised and must be steadily disallowed.

It must be understood, in speaking of the Kangra forests, that I am merely stating what *may legally* be done. I do not know what orders Government may actually pass. It may be that Government may think that practically the people of Kangra has been allowed to possess the forest with so little interference that it would be unadvisable to attempt to put the forests into regular conservancy, even though that conservancy should be exercised in the interests of the people. It is not to be expected that ignorant people will assent to any such plan, and this feeling may be considered: that is a point quite outside the sphere of a Manual of Forest law. If it is impolitic to preserve the forest, it must disappear, that is all. Possibly it will be thought right to attempt simply to continue the rules of 1855-60 (returning, however, to their spirit and intent) as a sort of intermediate plan.

Explanation.—For the purposes of this section "uncultivated land" means land which has not been tilled for a period of 20 years next before the 1st June 1879, or the date of the order constituting such reserved forest.

And, as a matter of fact, the khot is given one-third of the net income of the forest thus managed as a State revenue, in recognition of, or in compensation for, his rights, whatever they may have been, in the forest.

CHAPTER IX.

GOVERNMENT CONTROL OVER PRIVATE FORESTS IN CERTAIN CASES.

SECTION I.—THE INDIAN LAW.

§ 1.—*The Principle involved.*

It is a generally admitted principle of law that when some public interest is involved, or a public danger is imminent, private rights must give way to such limited extent as may be necessary.

It is on this principle that the law for the "Acquisition of land for public purposes" is based.

In the case of private forests, however, it is often sufficient to prevent their being totally cleared off and cut down, and to enforce their being worked in a conservative manner, without expropriating the estate altogether, or depriving the owner of the whole enjoyment of his property.

The interference in such cases may be very limited and therefore no compensation at all, or only a limited compensation, may be necessary.

§ 2.—*Popular Ignorance on the subject.*

It is sometimes objected by persons ill-informed about forest matters, that what are popularly (but not very accurately) called the "climatic influences of forests" are visionary and not established on a sound basis of proved experience.

It is true that the precise effect of forests (and still more so the precise extent of forest which has any effect) in increasing the rainfall is not yet completely known; but there are many other effects of forests which are not in the least doubtful, and these must not be overlooked, or confused with others that may be so.

The details of such cases of forest influence, and the full proof of its efficacy, cannot be set forth in a Manual of Forest law; but

from a legal point of view the fact (which I shall presently prove) that these effects of forests are admitted to be true and are accepted as a valid ground for interference, in the laws of *every one* of the European countries in which forests exist, ought certainly to be admitted as a proof that in India it is right, in some cases, for Government to interfere to prevent the destruction of even purely private forests, on such grounds.

§ 3.—*Indian Law Provisions.*

Chapter VI of the Indian Forest Act deals with this subject. There is no necessity in Burma for such provisions, the Act therefore omits them : all forest on hill ranges, &c., is there at the disposal of Government. Section 35 enables Government to interfere with *any* forest or waste land (no matter whose it is), so far as to prevent its 'devastation.' It will be found, practically, that to effect this object it is necessary to prevent—

(*a*) the total clearing of the land so that it ceases to be forest;

(*b*) burning or cutting down wholesale the surface growth, even when it cannot be called 'forest;'

(*c*) the excessive pasturing of cattle, whereby either existing forest is endangered, or if (as is usually the case where this section has to be applied) the forest has already disappeared, but the restoration of the growth of grass, trees, and herbaceous vegetation is prevented.

According to the circumstances of the case, it may be necessary either absolutely to *prohibit* such acts, or simply to *regulate* the process.

The circumstances under which this interference is allowed are stated in the Act, and the local Government is left to judge that the interference is necessary; not, however, without giving the forest owner a chance of being heard, as I shall presently explain.

§ 4.—*Explanation of the dangers which arise from forest denudation.*

Before proceeding to deal with the terms of the Indian law, it may be well to call the student's attention to the circumstances

under which the law can be called into operation. I will exhibit three circumstances in a classified order, which will, I hope, enable him to understand and to remember what they are :—

I.—Dangers affecting the soil in mountain countries—

(*a*) To prevent soil being wasted or cut away by the rain, and the formation of water channels, ravines, and torrents on ridges, or slopes, and in mountain valleys ;

(*b*) To prevent falling of rock and rolling stones ;

(*c*) To prevent avalanches or masses of snow sliding down steep declivities ;

(*d*) To protect against wind and storms.

N.B.—The débris and materials borne down as the result of any of these catastrophes may block roads, destroy buildings and bridges, cover culturable land, and so forth, as well as block up streams, causing disastrous floods.

II.—Dangers to water-supply—

(*a*) To maintain the supply in springs, rivers, and tanks ;

(*b*) To regulate the periodical filling of tanks, &c ;

(*c*) To maintain an equable discharge of water into streams and rivers, preventing sudden rises of the water-level by the violent discharge of mountain streams and feeders into rivers, causing consequent floods which may extend far away into the plain country.

N.B.—The breaking of the violence with which rain falls on the surface is a most important effect of forests, but this discharge, if violent and unexpected, produces the calamities mentioned under I.

III.—Danger to public health and convenience—

(*a*) Prevent spread of malaria over marshy places, &c.[5]

IV.—Danger (chiefly in the plains) to land, houses, &c.—

(*a*) To protect against floods ;

(*b*) Against hot winds and storms ;

(*c*) Spreading and shifting sands.

[5] It is obvious that under this head we may gradually go on step by step to cases where merely general amenity and sense of comfort are concerned : as where a country is generally denuded of its trees, it becomes unpleasant to live in and the climate is more apt to be extreme. Our Indian law does not attempt to go beyond cases of distinct and actual danger.

§ 5.—*Procedure under the Act.*

The procedure in cases where it is necessary to prevent the clearing or devastation of private forests, which would involve any of these dangers, is first of all to issue a notice calling on the forest owner to show cause (within a reasonable time fixed in the notice) why the notification declaring the necessity of the case and the particular remedy required, should not issue.

No question, it will be observed, arises whether the land is forest or not; it may be timber forest, or a tract covered only with brushwood, herbage, or grass, and yet it may have the desired effect[6].

The objections and evidence in support of them (if any) offered by the owner are heard by an officer specially appointed, who records his opinion, which is then 'considered' by the local Government.

Supposing the local Government to decide against the objection (or that no objection is offered), then a *notification* is issued in the Gazette *specifying* the *limits* of the tract and *declaring* the *prohibitions, regulations,* &c., that are called for. This of course will be drawn up with the advice of a forest officer.

§ 6.—*Mere Protection may not suffice.*

It will often happen that mere prohibitions are not enough,—actual planting works, fencing, levelling of soil, erecting weirs across ravines, and other appliances familiar to students of reboisement works, are necessary. Such works may be constructed or carried out, but always at the expense of Government.

§ 7.—*Further Steps, when Owner is negligent, &c.*

It may happen also—

(1) that the regulations are either neglected or disobeyed;

(2) that the works cannot be properly successful without bringing the area under the complete control of the Forest Department.

[6] I need hardly remind the reader that in some cases land solidly turfed is just as good a protection as forest, or at any rate is in itself sufficient in the absence of a denser clothing. There are many places in the Alps where danger is averted simply by "regazonnement," or growing turf or herbage on the ground.

Section 36 then provides that after *another* notice to the owner, and receiving his explanation or objection, the land may be *taken under the control of the forest officer*, subject to all or any of the provisions relating to regularly constituted forest estates, *i.e.*, "reserved forests" (Chapter II).

The management is undertaken accordingly, and the profits are paid over to the owner after deducting cost of management (*i.e.*, the Act speaks of net profits)[7].

§ 8.—*Cases where actual Expropriation is requisite.*

There are cases, under the circumstances indicated, where the danger is very imminent and where the land is in a bad state, and where it would be really the best plan for all parties that Government should acquire the estate outright. Where this is the case, section 37 gives *power to Government to expropriate* the land for a suitable indemnity under the Land Acquisition Act.

In *any* case, where a notification under section 35 has been issued if the Government interference is kept up for three years, the *owner may require* Government to expropriate the land. But his claim to this effect cannot be made *before three years, nor after twelve years* from the date of the notification.

§ 9.—*Voluntary Submission to Conservancy.*

Anybody may, under this chapter (section 38), either because his estate is becoming deteriorated, or otherwise, apply to Government to take it under forest management.

SECTION II.—EUROPEAN LAW REGARDING PRIVATE FORESTS AND OTHERS HAVING A PROTECTIVE CHARACTER.

§ 1.—*Object of the Section.*

It will now be instructive to compare this Indian procedure

[7] But, I take it, this means the cost of establishment and supervision (proportionate share of the supervising officer's pay and allowances) and of ordinary work; not the extraordinary expenditure on planting and reboisement appliances, because such works are by the last clause of section 35, constructed by Government at its own expense.

with the law in other countries. This will establish the reasonableness of such an interference as was legalised, and, moreover, some special points may come under our observation worthy of introduction in our practice.

§ 2.—*The French Law regarding private Forests.*

The French law at the outset states that private forest-owners will enjoy their property fully, subject only to the provisions of the Code. Those provisions will be found in Articles 117-124, and Articles 136 and 219. The last is the really important one.

Under it the clearance of forest (défrichement) is not allowed without the proprietors giving four months' previous notice at the office of the Sous-préfet. But under certain circumstances (to be stated presently) the Forest Department may record an *objection* to the clearance.

The process of objecting is this: the Forest Department gives warning to the parties interested, and sends an officer to inspect the place and draw up a minute report on the state, situation, and circumstances of the forest. This is communicated to the forest owner, who is at liberty to record remarks on it. This "procès verbal," when filed in reply to the notice, constitutes the departmental act of objection to the clearance.

The Préfet in Council now considers the matter, and notice of his decision or opinion is given to the forest officer and to the proprietor, when the whole proceedings are sent up to the Minister of Finance, who after consulting the proper section of the Conseil d' E'tat, finally decides the matter.

The Minister must give his orders within six months of the departmental objection being signified, or else the proprietor is at liberty to proceed with the clearance.

Article 220 states the circumstances under which the Forest Department can file this objection; it is when the preservation of the forest "is recognised as necessary"—

(1) for the maintenance of the soil on mountains and slopes;

(2) for the defence of the soil against erosion and being

flooded and overborne (*envahissement*) by streams, rivers, or torrents;

(3) for the maintenance of the water-supply in springs and streams;

(4) for the protection of dunes and the coast against erosion by the sea, and the spread of sand;

(5) for the defence of any territory in such part of a frontier zone as may be specified by a public order of the Administration concerned;

(6) for the benefit of the public health (*salubrité publique*)[8].

The other provisions of the Code, Articles 117—121, &c., relate to minor matters. Private forest guards must be approved by the Sous préfet and must take the oath of forest service. Private proprietors may claim to free their forests of rights by the same means as Government can by "cantonnement" and money compensation; so a private proprietor can keep grazing out of the growing portions of his young forest, and can apply to the Administration to declare what parts of his forest are not safe against cattle and should be kept closed[9].

A proprietor who makes a clearing after it has been prohibited is liable to a fine of at least 500, but not more than 1,500 francs, for

[8] Certain lands are not considered "forests" for the purposes of this Article, for example, a park or pleasure-ground attached to a dwelling-house, and generally small plots of woodland not exceeding 25 acres in extent, unless such plots are on the summit or slopes of a mountain, when they are not excepted. An important exception also is that if the wood has been planted within the last 20 years, it is exempt. The idea involved in this rule is, that the forest is not a gift of nature, which the proprietor can be asked to use for the benefit of the neighbours as well as himself; he planted the wood, and if he had not done so, there would have been none, so that no one can complain if by cutting it down he merely leaves things no worse than they were naturally (Article 224). All plantations of trees on the tops and slopes of mountains are declared exempt from all taxes (de tout impôt) for 30 years by Article 226. This is to encourage planting in such situations.

[9] Article 124 gave a right for ten years after the passing of the Code to the Marine Department to have a first refusal of oak trees of a certain size whenever cut for sale; this has now expired.

Article 136 requires certain facilities to be afforded in getting 'oseraies' (willow branches) from private forests for the Rhine embankment works.

every hectare cleared (that is approximately 80 to 240 *rupees* per *acre*), and to be made to replant the cleared places within three years. If this is not done, the department may, on an order of the Préfet, do the planting by its own agents, and recover the cost from the defaulting proprietor.

These provisions of the law are general, and besides them there are the special laws for reboisement and covering with turf and herbage (regazonnement) denuded mountain areas, and printed together with the Forest Code in the small departmental edition.

§ 3.—*Law of Reboisement and Regazonnement.*

It will not be necessary to do more than glance at the principal provisions of the law of reboisement. The still existing law is contained in the reboisement law of July 28th, 1860, and a subsequent law of 1864. But a project for a revised and much simplified law has been adopted by the Senate and submitted to the Chamber of Deputies in January 1881, and it seems in every respect probable that the law will be passed.

The law of 1860 had some rather complicated provisions for publishing by the Executive Government a "declaration of public utility," and then the perimètre to be operated on was declared, after an enquiry by a series of authorities, among whom was a special commission. It seems that this discussion included the question whether the work was needed at all, and whether there was any danger, which it seems very useless to allow, since the professional advisers of Government are the best judges of that.

Various provisions were made in cases where private or communal owners of land in the declared perimètres, undertook to do the work themselves. There was at first much opposition to the law, and it was urged that in a great many cases it would be as well or better not to create forests (*reboise* the lands), but to restore the *grazing* ground, *i.e.*, the soil would be consolidated by restoring its covering of turf and herbaceous plants; this of course could be done with much less restriction on the communes, and in a much shorter

time than reboisement. A further law for "regazonnement" was then passed in 1864. Any perimètre formed under the law of 1860 might, on application of the commune, be reconsidered, and the order for its reboisement altered by the substitution in whole or in part of *regazonnement.*

The proposed law to which I have alluded (and of the passing of which I have yet no news) combines and supersedes these laws, but it will deal with the old areas declared under the law of 1860-64 in the following way. It will give the Forest Department three years to consider the whole subject, the areas being meanwhile maintained *in statu quo.* Within this period the Forest Department are to consider what lands it will be desirable to retain, and to publish a list accordingly. All lands not shown in the list will then revert to the unrestricted enjoyment of the proprietors. A further period of ten years is fixed for the settlement of all claims which may arise consequent on the expropriation, according to the new law, of the lands which are selected (and which, under the old law, may not have been entirely expropriated).

The new law will deal with the entire subject of mountain slopes and their preservation.

Where there is a real danger actually existing—the soil already ruined, and torrents formed—works of restoration will be necessary. This necessity will be declared by a special law passed by the Chambers.

The passing of the law will be preceded (1) by an enquiry in each commune concerned; (2) by a deliberation of the Municipal Councils of each commune; (3) by a reference to the Council of the *Arrondissement*, and of the *Conseil Général*; (4) by a further reference to a special committee under the presidency of the *Préfet*, certain members of the Councils, two members to represent the interested communes, one engineer and one forest officer. But I understand that there is a wide difference between the proposed and the earlier law in this respect. The necessity for action and the existence of the danger will be taken for granted when once the "law" for the

undertaking of the work is issued. Any further objection will relate only to the extent of the perimètre and other subsidiary matters.

The works on the perimètre are undertaken by the State, and the area is acquired as State property, either by amicable arrangement or under the law of expropriation.

Private persons, communes, &c., will, however, be allowed to avoid expropriation and undertake the works themselves, if they can come to suitable terms with the Government: and they may form "associations" with a certain legal status, in order to carry out works which would perhaps be beyond the power of any one estate by itself.

When there is not this actual existing danger, but only a desire to preserve the forest so as to prevent the possibility of danger[10], the law allows public aid to be given (by gratuitious gifts of seed, plants, &c., or by money grants), in order to promote works of plantation and so forth. The Article 224 of the Code, which

[10] The details of procedure, as to how private persons are to signify that they will carry out works, and when their refusal may be assumed; how the works are to be carried out on lands expropriated, and how an account is to be sent in showing what the cost has been (and this sum he will have to pay back, if he claims the restoration of the land), and all other matters will be contained in an Ordinance to carry out the law, which, in fact, is like our "Rules" made under the Act.

The procedure under the law is somewhat elaborate, and it certainly is far too much so for any Indian districts. The fact is that ignorant municipalities might, and I believe do or did, give very great trouble, and put every obstacle in the way of reboisement work. Such a law, so restrained by the elaborate procedure for consultation and revision of every project, before the orders for the work can issue, would certainly be inefficacious but for the progress of public opinion, the fact that in many cases the perimètres have got so bad that the necessity for action has become obvious now to the most unreasonable, and above all the example that successful works set to the communes in the country round.

It must of course much depend on the angle of inclination, the elevation, the nature of the soil, and other circumstances, what sort of work for restoration, whether replanting or turfing, or growth of herbaceous plants, is enough. Sometimes alternate belts of meadow land and wood prove useful.

A system of fruitières has been established in connection with gazonnement works, which I understand to be reserves for the production of seeds of forage plants on the large scale and of roots for cattle feeding. Such devices tend largely to diminish inconvenience and opposition to the necessary works of closing the area against grazing a necessity which no country and no climate can avoid.

ordinarily excludes plantations made within the last 20 years by the proprietor from the rule which restricts the total clearance of forest land, is declared not to extend to any reboisement made under this law.

In the same way, where it is sufficient merely to stop or regulate grazing, without taking up a perimètre for regular reboisement operations, the land can be subjected to protective closing against grazing (*mise en defens*). This can be done whenever "the soil shows signs of being cut up by ravines or the soil deteriorating." The forest administration here can submit a formal demand for the '*mise en defens*.' It is considered by the same series of Councils, &c., as before, and the matter is decided by the *Préfet*. The closing is to last for 10 years, but may be renewed with the same formalities. The rights stopped by this closing are compensated. The sum paid goes partly to the municipal fund of the commune, partly to the inhabitants of the commune whose rights are suspended. The forest law penalties are applied in cases of infringement.

A third stage is also contemplated, *viz.*, when neither there is an actually existing state of denudation or torrent action, &c., nor a danger such as would demand a closing of the area, but simply when the pasturing of cattle ought to be regulated so as to preserve the grazing-ground from deterioration. The communes in which this is necessary are to be declared in a list prepared by the Forest Department. These communes are themselves to propose the regulations they think will suffice, and these will extend to fixing the *number* and *kind* of cattle which may be allowed to graze, the beginning and end of the season of grazing and any other conditions necessary to impose. If they neglect to do so, or if the Forest Department do not approve of the proposals, and the communes decline to introduce the necessary amendments, the Préfet is given power to enforce the regulations recommended by a special committee assembled for the purpose of deciding the matter. Certain penalties of the ordinary criminal law are applied in case of a breach of the regulations.

§ 4.—*The Prussian Law.*

I will now turn to the illustrations afforded by German legislation.

In Prussia a law was passed in 1875[1], which applies to all forests which have a "protective" character. Practically, as State and other public forests are already under the forest *régime* (which is not affected by the law in question), this law chiefly affects private forests.

The list of circumstances under which action may be taken is given here for the sake of comparison with that in the Indian Act. Forest has a protective character and its destruction may be prevented when—

(*a*) The soil is sandy, and consequently neighbouring lands, public works, and watercourses, natural or artificial, may be covered up or choked with sand which would be let loose by the destruction of the forest which winds the soil and covers its surface.

(*b*) Where, as a consequence of erosion of the soil, or the formation of ravines and torrents on denuded summits and slopes of mountains, subjacent properties, roads, or buildings are menaced with injury, or with being buried beneath landslips and falls of stones, or even with being carried away by the landslip itself.

(*c*) Where, if forests on the borders of rivers and watercourses were destroyed, the neighbouring estates might be liable to damage from floods, or where works of all kinds are protected by forest from the effects of the rush caused by the sudden melting of ice and snow.

(*d*) Where the clearing of forest growth would diminish the water-supply in streams and rivers.

(*e*) Where such clearing might, in country of an open or generally bare character, or in the neighbourhood of

[1] Jahrbuch des Preussischen Forst, 1876, No. 8. There is a French translation (which I have used) in the *Revue des Eaux at Forêts*, Vol. 15, page 240.

the sea coast, expose villages and their cultivated lands to the action of storms.

In all these cases a proposal may be made, and a decision on it given, with the object of regulating—

(1) the manner of cutting and working the forest (forest exploitation);

(2) the execution of planting works;

(3) the construction of accessory works, such as dams, weirs, spurs, &c.

The proposal can only be entertained when the loss to be guarded against is shown to be greater than the loss to the forest proprietor from suffering the restrictions and carrying out the works proposed.

Various parties who have the right of initiating the proposal before the proper public tribunal are enumerated. The proposal has then to be examined, and one of the members of the tribunal (or even an expert unconnected with it) is appointed as Commissioner to draw up a project stating the regulation, and the works required in the particular case. This project is then deposited, so that interested parties may study it and send in objections if they wish to do so. Objections, if any, are decided on by the tribunal. The question, however, whether danger does or does not exist (if this is disputed) may be gone into as a preliminary before the project is prepared.

If the project is accepted and interference takes place, the forest proprietor is indemnified for his loss and for his expenditure on planting and other works. The party making the proposal is responsible for the indemnity, and for the cost of making and keeping in repair the necessary works; but in cases of danger—(*a*), (*b*), and (*c*)—the proprietors of all the estates menaced must contribute in a proportion fixed by the law.

In all cases the forest-owner must contribute to the expense of works of protection, in a proportion also fixed by the law.

§ 5.—*The Bavarian Law.*

The Bavarian law of 1852, Article 35, provides that private forest may, as a rule, be cleared, if the object is to devote the land to agriculture, to make it into a vineyard, or restock it with a superior class of forest trees; but this is not to be done if the forest is "protective" (*Schutzwald*). Article 36 specifies three kinds of protective forest:—

(1) *all* forest on summits and steep slopes of mountains;

(2) forest which protects against falling stones ("stone-shoots" I might call them—sudden discharges of masses of loose stones), avalanches, and landslips.

(3) forest belts which protect against shifting sands, and against the destructive action of rivers and streams.

No process of cutting by clearing entire blocks (*Kahlhiel*) is allowed in any protective forest; nor must the forest be "devastated"—worked in a destructive and wasteful manner (*verwustung*). Blanks and deficiently stocked places must be planted up.

§ 6.—*The Austrian Law.*

The Austrian law of 1852 in some respects resembles the French law.

No forest can be absolutely cleared away without permission. State forests can never be cleared save with special State sanction in certain grave and exceptional cases, as in time of war, &c.

No forest can be "wasted" so that it will soon cease to exist as forest, and timber growth become impossible[2].

Private owners may be compelled to re-stock blanks in their forests if these have a protective character. One forest must not be cut down so as to expose another to the action of wind and storm; a belt 20 klafters wide must be left.

In all forests at a great elevation, or on steep slopes, and wherever there is risk of the soil giving way, the forest must only be cut in narrow strips, which must be immediately re-stocked.

[2] Arts. 6 and 7.

Timber forest near the limit of tree vegetation must always be cut by the selection method (jardinage,—plänterhieb[3]), as this does not expose a large area of soil at once.

Forests of private owners are said to have a protective character, when they require special maintenance and treatment in the interest of the "security of the population and the safety of public and private property" against the various dangers which are enumerated, very much as I have already more than once enumerated them. Private forest in such case may be placed under restrictions (*bann*) by public authority. Compensation can be claimed where this results in a restriction of rights and the enjoyment of the property[4].

§ 7.—*The Italian Law.*

In Italy *all forests,* within certain limits[5], are placed under the provisions of the Forest law (*sottoposte al vincolo forestale*).

But lands cultivated with vines, olives, and fruit trees, and suitably terraced[6], are exempt from this rule.

Clearing and grubbing up by the roots (*disboscamento e dissodamento*) is prohibited; but permission may be given to change a forest into *bonâ fide* cereal cultivation if it is shown that means are provided to prevent any risk.

[3] Articles 2—4.

[4] Article 19. A provision is added which I should say was singularly inefficacious, *viz.*, that the forest-owner is to *take an oath* that he will observe (he is held responsible for so doing, besides) the special regulations prescribed for the forest placed in "bann." Inspection is of course provided for.

[5] The forests so situated are described in the law (June 1877) as "all woods and forests and lands covered with woody-stemmed vegetation (*piante legnose*)—(*a*) on the crests and slopes of mountains up to the upper limit of the growth of the chestnut (*Castanea vesca*), and (*b*) those which from their nature and situation might, if they were cleared away and rooted out, give rise to landslips, subsidences of soil, formation of precipices, avalanches, disturbances (to the public detriment) of the flow of water, alterations of the consistency of the soil (*e.g.*, bringing about a marshy state of the ground), or damaging local hygienic conditions."

[6] Compare Hazára Forest Regulation, II of 1879, section 20.

The forest committee[7] lay down certain principles as to the maximum amount of cutting, the method and locality of cutting, so as to prevent injury to the soil and secure the natural reproduction of the forest. To these the forest-owner is bound to conform.

The forest committee was charged with the duty of making a list of all lands that came within[8] the terms of law in their opinion, and provision was made for hearing and deciding objections of the parties interested, to this list.

There is a chapter on reboisement work. It is not necessary to give details. It applies to the lands under the forest law (*vincolati*) according to the terms of the statute. The proposal for reboisement work is originated either by the Minister of Agriculture, or the provincial or communal authorities. The work is carried out at the joint expense of the Government, the province, and the communes interested. The forest committee direct the work.

The State is always allowed to expropriate against an indemnity, any of the lands that come under the forest "*vincolo*," unless indeed the proprietor make a declaration that he will undertake to do the reboisement work in the manner and within a limit of time prescribed by the forest committee.

Provision is also made that a number of proprietors wishing together to reboise a certain area may form themselves into a recognised legal association (*consorzio*); and if some persons having lands in the middle of the group will not join, the rest may claim to expropriate him and acquire the land in question, so as to enable them to carry out their scheme[9].

[7] A committee consisting (*a*) of three members nominated by the Provincial Council; (*b*) of an engineer nominated by the Minister of Agriculture, Industry and Commerce; and (*c*) an Inspector or Sub-inspector of Forests. The "prefetto" of the province is *ex-officio* president. (See note at page 80 *ante*.)

[8] I do not go into detail, as of course this list has long ago been prepared; it would naturally exclude some lands that might have been included by older law, and include some that were in 1877 for the first time brought under the terms of the law by the definition above described.

[9] Law of 1877, Article 14. A number of these provisions are very excellent as provisions, but unfortunately so much is left to the committees, which may have a

§. 8.—*Law of Switzerland.*

Lastly, in this review of continental laws, I propose to notice the general law of 1876 for the maintenance of protective forests throughout Switzerland.

In many cantons there exist local laws for the preservation of forests, and in some the laws have been well observed for many generations[10]. These laws, even where they exist, vary from place to place, while in other parts there were as yet no laws, so that it became highly desirable for the Federal Legislature to agree on a common measure for protection of forests. This was the more important because the destruction of forest produces evils that are felt far beyond the limits of the canton in which the forest lies. The action of one or two torrents may be the cause of sudden and disastrous floods, which affect the river into which they discharge themselves, and sweep away or overflow properties many miles down-stream. A road may be covered with *débris* from a single badly denuded locality, and the communication of half a dozen important towns may be affected by it. Hence joint action was especially desirable.

The law applies to all mountainous cantons and to such parts of other cantons as are mountainous and as are declared to be subject to the law. In this zone of the federal forest *régime, all* forests, public or private, are under the "surveillance" of the Confederation, if they have a protective character; and all *public* and *communal* forests are included, even if not strictly speaking protective.

Article 4 describes what protective forests are, and in order to complete the series of definitions which I have already given from

majority of ignorant and prejudiced persons, who can defeat every proposal for enlightened action. Forest restoration demands foresight and a deliberate consent to put up with some present inconvenience for the sake of future safety; but the form 'ignorance' takes in forest matters is always a shortsightedness which can see nothing but the present. Hence it is that the forest law has worked so little good in Italy.

[10] Especially the northern cantons. See *Revue des Eaux et Forêts*, Vol. XV (July 1876), page 233.

several European laws for the sake of comparison, I will translate this also :—

"Forests of a protective character are those which by reason of their elevation, or their situation on steep-slopes, on mountain summits, ridges, spurs (*saillies*) ; or in the catchment areas of streams ; in mountain passes, ravines, and along the banks of streams and rivers ; or being in a country generally devoid of trees ;—serve as a protection against climatic influences, ravages by wind-storms, avalanches, falls of ice and snow, stone-shoots, subsidence of soil (*affaisement*), undermining of the soil by water (*affouillement*), erosion of ravines, and torrents and inundations[1]."

All cantons are charged with the duty of settling and declaring within three years what forests come under the law and what do not ; and they *must demarcate all protective forests* within a period of five years.

The Confederation appoints an Inspector and staff to see that everything is carried out according to the law.

Article 9 provides that the cantons shall open schools of forestry or give instruction (*au moyen de cours de sylviculture*), so as to provide for training a number of forest employés.

Article 11 unfortunately leaves it to the authorities of cantons to allow any part of the forest to be cleared : this is very dangerous ; but complete clearing in a protective forest is absolutely prohibited, and also of forests in the neighbourhood of protective forests, if such clearing would compromise the existence of the protective forest.

No exception can be made without sanction of the Federal Council. As usual, partition of communal forests or their alienation, is prohibited.

All rights of grazing and other forest rights are to be got rid of by compensation within ten years, if they are "incompatible"

[1] Protection against shifting sands, or against malarious influences, would naturally not find a place in Swiss mountains.

with the maintenance of the forest in such a state as to fulfil its object.

Wood-rights, if they cannot be bought out with money, may be commuted for a "parcel of land of the same nature" elsewhere. (Article 14).

All rights may be regulated and restricted to being exercised in certain portions of the forest only, or they may be if necessary "suspended or suppressed" (I presume with compensation under the preceding article).

No new rights are allowed to grow up.

All forests are to be managed according to schemes of working which are to fix the maximum annual yield.

The cantons are to arrange for the protection and exploitation of the forests.

A very necessary provision then follows. Hitherto, the law has only spoken of the protection of existing forests, but there may be many cases where now there is only bare land where there ought to be forest. Article 21 then provides that "lands which might become important protective forests within the meaning of Article 4" shall be reboised on the requisition either of the Government of the canton or of the Federal Council.

If these lands appear to be private property, they must be expropriated under the usual law.

The Confederation will aid with its common funds important works of reboisement.

These are the chief provisions of the law which are likely to interest an Indian student[2].

[2] When I received the text of this law there was still an opportunity, though a short one, for its being altered; but I have not heard of any amendment being introduced.

CHAPTER X.

OF RULES MADE UNDER THE ACT.

§ 1.—*Reason why Rules are required.*

The idea of leaving the details of a measure to be worked out by local rules, while the principles are laid down in the Act itself, is not peculiar to India. The French Code of 1827 is supplemented by the "Ordonnance," which is nothing less than a set of subsidiary rules, though not quite of the same nature as rules made under the Indian Forest Act. But in India there is a peculiar necessity for enlarging the power of making rules, because the Act has to apply to different provinces, with people speaking different languages, and with considerable variety of local usages, domestic and agricultural wants, and living under widely different physical conditions.

The rules made under the Act are, in fact, parts of the law which it would be inconvenient to enact by the Central Legislature, and which are referred by delegation to the local Government. Rules under the Act are consequently of the same general character as sections of the Act itself. In other words, the rules must deal with matters which properly come within the scope of legislation, that is, involve the creation, extension, or limitation of some right or obligation, or impose some penalty or forfeiture; they do not concern themselves with matters of executive regulation or departmental practice, which can be prescribed by executive authority, and do not need legislative authority to give them force.

This point is not unimportant, because, quite contrary to the principle so stated, local rules are sometimes sent up for sanction which are full of matters of executive order, or departmental administration, such as the contents of schemes of working, the

salary or percentage of collections to be allowed as remuneration to village and other forest officers, and such like[1].

If we go through the Indian Act[2] we shall find that there are various sections which give power to make rules: these are sections 14*c*, 15, 25*i*, and 25 (last clause), 27, 31, 41, 51, 75.

All rules, without exception, have the force of law so far as they are consistent with the Act (section 77), provided they have been published in the local official gazette.

It will be observed that rules are to be made from "time to time," or (as in the Burma Act) it is said, in a separate section once for all, that all powers to make rules, &c., may be exercised from time to time. This is a legal form which obviates the objection that power given to make rules (*without* such qualifying phrase) could only be exercised once, and would be exhausted when once rules had been made, so that no further addition or amendment or new issue of the rules would be possible.

It is declared that rules for the management of village (communal) forests, under section 27, rules regarding protected areas (section 31), and rules regarding the control of timber in transit (section 41), require the sanction of the Governor-General in Council, as an additional condition to their legal validity. The Burma Act has not adopted this not very necessary addition. The only use of it is that a certain amount of uniformity in the rules is obtained. And it may be considered that, as the rules under section 41 really amount to a measure of local

[1] It is urged that it is convenient to have all the rules relating to a subject in one set or series, so that the subordinates who have to work the rules may understand the whole subject, both in its departmental and legal bearings. That may be very true, and there is nothing whatever to prevent the local authority printing and publishing the *rules which require legislative authority*, along with the notifications of fact and rules of practice relating to the subject in such a form that officers and the public may have the whole in a convenient pamphlet. But that is quite a different thing from placing under a common heading, as covered by legislative sanction, a mixed mass of rules that do, and rules that do not, require that sanction.

[2] The Burma Act is so similar that the student can easily make the comparison for himself.

legislation in which important restrictions may be placed on the ordinary liberty of transporting property, it is right that the highest authority should consider and sanction the rules. This reason could, however, hardly be given in case of rules under sections 27 and 31, which are matters that ought to be left entirely to local consideration.

The subjects on which the rules may be made are as follows:—

1. Rules for the guidance of Forest Settlement Officers awarding compensation for rights (section 15);
2. Rules for the general management of—
   (*a*) permanent (reserved) forests (section 25, last clause.)

[NOTE.—These will rarely be wanted, since the management will, as our work progresses, be dependent on working schemes, which, though departmentally authoritative, could not be held to be in the nature of legal rules.]

   (*b*) Rules for hunting and fishing in reserved forests. (Section 25*i*).
   (*c*) Rules prescribed for regulating rights admitted to be exercised in reserved forests. (Section 14).
3. Rules for management of village forests. These—
   (i) Regulate the system of working;
   (ii) Prescribe the conditions under which the village enjoys the produce, &c.;
   (iii) Lay down the duties of the village for the protection and improvement of the forest. (Section 27). (Sanction of Governor-General in Council necessary).
4. Rules for the management and utilisation, as well as for the protection of areas called in the Act "Protected Forests." (Section 31). The subjects of the rules are specified in section 31. (Sanction of Governor-General necessary);
5. Rules for the control of timber in transit, whether by land or water. Separate rules are usually made for each kind of transit. The subjects are specified in section 41. (Require the sanction of the Governor-General);
6. Rules for management of *drift timber*, salving and disposing of it—subjects specified in section 5;

7. Rules for prescribing the *duties* of *forest* officers (section 75*a*);
8. Rules regarding payment of *rewards to informers* (section 75*b*);
9. Rules which may be required in some places where *valuable trees*, such as teak, blackwood, and so forth, *belong to Government*, but the *land on which they stand* is the property of (or in occupation of) *private* persons; to protect the *growth* and *reproduction* and provide for their *disposal* (section 75*c*);
10. General *subsidiary rules* which may be made on any subject necessary in order "to carry out the provisions of the Act."

Some of these rules are such that they prescribe conditions and terms, and do not require any penalty. But in all cases where a breach of a rule is clearly a penal one, and there is no special penalty, then the penalty of *imprisonment*, which may extend to *one month*, or *fine*, which may extend to *rupees five hundred*, or *both*, is in all cases applicable. (Section 76).

No penalty need be attached to any rules made under section 25, since section 25 itself specifies penalties. The same applies to rules made under section 31. But rules under section 41 are (section 42) to express their own appropriate penalties within the limits fixed by section 42. And so with rules under section 51.

§ 2.—*Meaning of Local Government.*

It will be asked what is meant by the "Local Government" which makes rules? It must be borne in mind that the General Clauses Act I of 1868 (section 2, No. 10), as regards *all* Acts passed *subsequent* to it, makes the term "Local Government" mean not only the Governor or Lieutenant-Governor, but also the Chief Commissioners. So that although, strictly speaking, in those provinces taken under the direct management of the Government of India, like Burma, Oudh, and the Central Provinces, the Governor-General in Council is the local Government, still the functions of the local Government are, by this definition, delegated in all cases

where the term "Local Government" is used without any restricting or explaining clause in Acts subsequent to 3rd January 1868[3].

§ 3.—*Remarks regarding Rules.*

A few words of explanation regarding the object and nature of the rules may now be offered.

Rules coming unedr the headings previously numbered 1, 2, 3, 5, 6, 8 require no explanation in this respect.

Rules under section 31 are somewhat peculiar: the subjects on which they are to be made are specified, but it will be observed that the penalties in section 32 apply partly to breaches of rule as such, and partly to acts which are offences against the declarations or prohibitions notified under section 29.

It is obvious that rules cannot be made to clash with such prohibitions.

For example, if a prohibition has been issued against clearing land for cultivation, this is absolute (as long as it is unrescinded), and rules cannot be made to allow cultivation under certain conditions[4]. Not so with reserved trees; for here the declaration under section 29 does not say that the trees are never to be touched or

[3] In Acts previous to this date (on which the General Clauses Act received assent) the definition does not of course apply, and then the term "Local Government" was used strictly; and when the Governor-General desired to delegate his functions as Local Government to the Chief Commissioner, who was the Local Administrator of his orders, he did so by a special Act, or by words in an Act. Thus, in 1867, the Act No. XXXII was passed to delegate certain powers to the Chief Commissioners of Burma, the Central Provinces and Oudh. Powers under all sections of the Police Act V of 1861 (except section 4) were delegated in this way for example. In the old Forest Act (VII of 1865) special provision was made for giving powers to Chief Commissioners.

This definition in the General Clauses Act does not operate to delegate powers if there is anything to the contrary; and when Assam, for instance, was separated from Bengal, special Acts were passed which made the Governor General the Local Government, and he had by notification expressly to delegate certain powers which he had as Local Government to the newly-created Chief Commissioner; powers of a Local Government under Act VII of 1878, are among them (Notification No. 522, Home Department: *Gazette of India*, 18th April 1874, page 182).

[4] This has not always been attended to. I have seen a draft in which it was said that no cultivation could be effected without permission, &c. Such a rule,

utilised, but only that they are "reserved;" consequently rules may prescribe the way in which trees reserved may be cut and utilised; only damage to such trees is absolutely forbidden.

Rules coming under head 7, are very important, as will be further seen in the chapter relating to the organisation of the forest service.

The Act[5] speaks throughout either of "a" or "any" forest officer, or else of "the" forest officer; and in certain sections (Article 67) speaks of officers "specially appointed." In the first case, of course, there is no doubt that all forest officers, of whatever grade, can act; but in the second, "the" officer is "the proper officer" or the officer "duly empowered in that behalf." Consequently rules under section 75 are needed to tell us *who* in these circumstances is "*the*" forest officer.

In the Burma Act another plan has been followed. In this, all acts are either done by "any" forest officer, or by one "specially empowered." This, equally with the Indian Act, requires a further expression of the pleasure of Government; but while in the Indian Act this is done by rules under section 75(*a*), in Burma it is done by official notification, declaring such and such grades of officers to be "specially empowered" to act under such and such sections.

Rules under head 9 refer to those cases (which occur chiefly in Bombay, but sometimes in other provinces) in which certain fruit or more valuable timber trees growing on otherwise private land belong to Government, and Government has a right to

could only be made either where no prohibition had issued, or in parts of the area to which the prohibition did not apply; for if cultivation has been prohibited, that means that the Collector *is to refuse all applications*. It is obvious that no waste land even now exists in which persons are permitted to seize on and occupy fields without permission; but the object of the prohibition is, that no such permission should be given. And so if there has been a prohibition against charcoal-burning, cutch-boiling, &c.

[5] The sections 16, 36, 67, and 60 (if a forest officer) contemplate the special appointment (by notification or otherwise) of the forest officer intended to be empowered; sections 43, 44, 45, 49, 52, 55, 58, 61, 62, 63, 64, 69, 71, 72, 74, 75, 78, 82 speak of "a" or "any" forest officer; sections 20, 24, 25 (*i*) 33, 38, 46, 47, 50, 56 speak of "*the*" forest officer (as known by rules under section 75*a*).

interfere so far as to *protect* the trees, see to their *reproduction* (if this is part of the right, but of course the introduction of the term in section 75 (*c*) does not create the right unless it exists), and provide for their *disposal*.

It is obvious that it may be very desirable to effect this object, although the land is so conditioned that it could not come under Chapter IV, nor yet be considered as in any sense a forest, whether "undivided" or otherwise.

Rules noted in the 10th heading (section 75 (*d*)) would cover the case of all matters which require to be provided under the Act, and which do not come within the specific enumeration of the subjects for rules under sections 31, 41, and 51. They possibly might be required in other matters, as in connection with timber duty and its levy.

§ 4.—*Remarks on drafting Rules.*

In drafting rules, it should be borne in mind that the terms must be consistent with the Act. The language should be precise and yet simple. Vague or general phrases which can be twisted to two or more meanings, must be avoided.

It is of great importance that terms which are *defined* in the Act, when used in the rules, should bear the legal meaning they have in the Act. And to secure this, the rules should open with a clause stating that all terms used in those rules and defined in the Forest Act have the same meanings as they have in the Act.

When rules are made under sections 31, 41, 51, &c., where a list of the topics or heads of rules is given by law, care should be taken that each rule can be clearly shown to come under one or other of those heads. If further points are to be ruled, not so included, but still within the general terms of the law, they should be exhibited as made under the general subsidiary powers of section 75.

Matters of administrative, departmental, or executive order, which do not require the sanction of the Act, and which the Local Government, or even the Conservator or the Divisional Officers, can

order as an executive matter, should not be introduced, as already explained. It may indeed be sometimes necessary, in order to make a subject intelligible, or to obviate any misapprehension, to make mention of some matter which does not require actual legislative sanction; but this should be introduced only when absolutely necessary, and as sparingly as possible.

It will be observed that when the Act gives power to the local Government by rule to authorise routes for export, or to levy fees on passes, &c., the rule must specify the routes and fees. But the rule is often drafted so as to declare that an authorized route is one on which the Conservator has established depôts for the examination of timber, and which he has duly notified, or the fees for passes are such as the Conservator shall, with approval of so and so, notify. This is illegal: it is held to amount to the *delegation* to the Conservator, &c., an authority which the Act says is to be exercised by the local Government itself, subject to the sanction of the Governor-General in Council. And so with regulating payments by rule under section 31(*d*) [6]. The rule must specify this, not say, that the payment is such as the Conservator of Forests in consultation with the Deputy Commissioner publishes in the bazaar or such like[7].

[6] In the Burma Act, it will be observed (section 36*h* &c.) it is said, that the rules may "prescribe *or authorise some specified officer to prescribe*" the fees, &c.; this obviates the difficulty.

[7] It has been held that under section 41(*b*) a rule could not be made requiring passes for *charcoal*, because this is not included in the definition of "timber" or of "forest produce." I suppose that it is held to be no longer "wood," but a *nova species*; I can hardly think, however, that this is maintainable, for the definition clause does not say that these things *are* forest produce and no others, but that the term *includes* the things mentioned: and charcoal is so very obviously an article of forest produce that the matter could hardly be doubted. In the Burma Act the word has been added in the definition clause.

I may also note that, according to the customs of legal interpretation, when it is said that a thing is done, or may be done, by some specified means or agency "or otherwise"—the word *otherwise* does *not* mean (in fact) to imply *another* or *different* method, but some *method analogous* to that mentioned.

PART III.

THE CRIMINAL LAW AS APPLIED TO THE PROTECTION OF FORESTS AND THEIR PRODUCE IN TRANSIT.

CHAPTER XI.

PROTECTION OF FORESTS AGAINST NATURAL CALAMITIES.

[NOTE.—Throughout these chapters it is expected that the student will refer to the Forest Act and the Indian Penal Code[1], and read the text of each section referred to.]

Forest estates, as I have remarked in a previous chapter, are threatened with two great classes of dangers, one is the large class of natural calamities, the other a still more extensive group of trespass and offences by men and cattle. Against the former the *law* can only make *indirect provision.* It can insist, for example, on one proprietor keeping up the whole or part of his forest, so as not to cause the exposure of the neighbouring forest or other property, to the fury of the wind, or the sweep of avalanches and snow-drifts. It can prohibit the destruction of, or interference with, birds of some or all kinds, in order that these may multiply and destroy the grubs or *larvæ* of insects[2] that attack wood, and caterpillars that eat off the eaves or injure the leading shoots of trees. Legal provision may be made for requiring assistance of right-holders and others in destroying caterpillars or locust-grubs.

The rules which regulate hunting may be the means of encouraging the destruction of those wild animals which are injuri-

[1] Act XLV of 1860, as amended by Act XXVII of 1870 and Act VIII of 1882. The latter comes into force on 1st January 1883 and will affect several sections, chiefly clearing up by legislative authority some points that are now held on the authority of decisions. This Code is quoted as Indian Penal Code.

[2] In several continental countries there are laws for the protection of birds; and I have read some rather detailed legal rules about the collection of ants' eggs (so-called—properly *pupæ*), ants being useful to a forest on account of their being enemies to caterpillars. (This, of course, does not meet with its parallel in India, at least as far as *white* ants are concerned, which are a great nuisance in forests.) (See Eding, p. 165 *et seq.*) In Saxony, a law was passed (17th July 1876) for the protection of forests from ravages by insects. I have not seen the text of the law.

ous to forests by grubbing up roots, barking, and nipping off the leading shoots of young trees.

Goats and other destructive animals may also be kept out by rule; but these being domestic animals, damage by them more properly comes under the next head.

In India, at our present stage of progress, it would not have served any useful purpose to have enacted in the Forest law any detailed rules on these subjects.

The preservation of *birds*, which is one of the first and most natural measures, as tending to protect the forest from insects and their *larvæ*, can be secured under our law, by rules made to suit local circumstances, under section 25. It is not necessary that these rules should relate *only* to game. The same rules also may be made the means of encouraging (where necessary) the destruction of noxious animals.

As regards the destruction caused by cattle under the control of man, that is partly provided against by the regulation of grazing rights, which we have already considered, and partly by the law of *trespass*, which comes under the next head.

Much interesting information on the subject of natural calamities will be found in the continental forest text-books; but here, as I am concerned only with the legal aspect of the subject, I must pass it by with this brief notice.

Forest fire might perhaps be classed as a natural calamity, because it *may* originate in a lightning stroke, but more often it is caused by human agency, and as it is the subject of direct legal enactment, I prefer to treat it under a separate section intermediate between the two.

I shall afterwards pass on to the other class of dangers to which the forest is exposed—offences by human agency and by cattle trespass—that is, all contraventions of the forest or general penal law which give rise to a criminal prosecution, and a penalty.

There may be also *injuries* to the forest which may not be *offences*, but may only give rise to civil action for damages.

CHAPTER XII.

PROTECTION AGAINST FIRE.

§ 1.—*Necessity for Special Rules.*

It is in relation to this question that the need of a special law for forests is most clearly illustrated.

To burn a forest is to cause, in a few hours, the loss of property which it has taken a century or more to produce or build up: and the injury to the public, for many years to come, by such destruction, is so great, and is at the same time so very easily caused, that it is absolutely necessary not only to punish wilful incendiarism[1], but also to prohibit acts which are in themselves not criminal, but which expose the public domain to this terrible risk, or which facilitate the extension of fire from a neighbouring place to the forest itself.

§ 2.—*In Reserved Forests.*

Actual *setting fire to* a reserved forest is an offence under section 25 (*b*), or to a protected tract under section 32 (*d*): and in either case a grave case may be prosecuted under the section of the Penal Code, already quoted in the note.

But besides this direct penalty for an offence accomplished, there are acts prohibited, the object being to prevent the possibility of fire reaching a forest. Under section 25, it is accordingly made penal to kindle any fire in such a manner as to endanger the forest. A person may carelessly set fire to some grass perhaps on the edge of a forest, with no intention of actually burning the forest itself;

[1] Indian Penal Code, section 435.—Mischief by fire, intending damage, or knowing it likely that damage will be caused to the amount of Rs. 100 or upwards, is punishable with imprisonment which may extend to seven years and fine, or with both.

yet there is so obvious and imminent a risk of this result occurring that the act is prohibited and rendered penal[2].

Another very useful provision is also made by clause (*c*) of this section (25). During certain seasons the forest is exceptionally dry, and the grass, leaves, and other such materials on the ground are ready to start into a blaze, at the least thing: an accidental spark, or the coal of a 'huqa' dropped on the ground, may set the whole on fire. It is absolutely necessary to prevent fire being carried or kindled during these seasons. And, to make the matter secure, the Act, it will be observed, puts the matter in a somewhat peculiar manner. It does not say that the forest officer may *prohibit* carrying, &c. of fire at certain seasons, *but it prohibits generally the carrying or kindling of fire except*, at such seasons, when the forest officer notifies that it is allowable to do so. In other words, carrying or kindling fire *is generally prohibited*, but a power is given to *allow* it, at certain seasons only when there is no risk. Any breach of this prohibition (whether or not a fire actually breaks out) will make the offender liable to the penalty.

§ 4.—*Suspension of Rights.*

In a "reserved" or permanent forest estate, there is an additional clause to section 25, which is in many cases found more efficacious as a protection against fire than fine or imprisonment. Wherever a fire has been caused wilfully or by gross negligence, the local Government may order (whether or no any other penalty has been inflicted) that the forest, or any part of it, may be *closed* for such time as it thinks fit, and all rights of grazing or to collect forest produce be suspended.

[2] In forests where grounds are demarcated inside the reserve for the practice of "toungyá," or "kúmri" or "júm" cultivation, there is great risk of this fire spreading. The actual kindling of fire in such grounds cannot be punished, because of the exception to section 25 already described: the act is done by virtue of the permission which sets apart the grounds for such cultivation. But one of the very first steps in conservancy in such cases is to take measures to prevent the fire spreading either to the forest, or to the other parts of the block allotted to such cultivation.

§ 5.—*Protected Forests.*

In tracts of forest merely "protected," there is a general power given by section 31, to make rules which may protect timber and valuable trees from injury; and besides this (as already noted), section 32, clauses (*c*), (*d*), make it penal to set fire to the forest, or to kindle fire without taking precautions to prevent its spreading and injuring timber lying in the forest, or "reserved" kinds of trees, or extending to a closed portion of the tract; and also the negligent act of leaving unextinguished a fire (which may have been lawfully kindled, but) which left thus burning, with no one to look after it, may give rise to a forest conflagration. This rule applies whether the fire is actually inside the forest or in its vicinity only[3].

§ 6.—*The Burma Act.*

The Burma Forest Act contains provisions generally similar to those of the Indian Act, but further adds in section 26 (regarding reserved forests) that rules may be made *about leaving fire burning* in the forest. This is necessary where the forest is large, and where travellers require to halt for the night inside the forest, and light fires for cooking, &c. These rules would be made regarding the clearing of camping grounds and the lighting fires in such places, and the extinguishing of them when the traveller proceeds next day on his journey. It is also an extremely careful rule to provide that when people are about to burn their toungyâ refuse, &c., in the vicinity of a forest they must *give notice* to the forest officer.

The carrying of *torches* at night, it is perhaps hardly necessary to add, is just as much an offence as any other form of fire carrying.

Persons must not travel at night through forests (unless at a season when the carrying of fire is allowed).

§ 7.—*Further protective provisions.*

Among other provisions for protection against forest fires, it is of importance to have early notice of a fire breaking out, and to

[3] It would have been well if this specific clause had been repeated in section 25, although the wide terms of section 25, clause (*b*), certainly include such a case.

have the assistance of as many persons as may be available, in quenching it. Section 78 contains such provisions. In any reserved forest or protected area *every person*—

(*a*) who exercises any forest right,

(*b*) who holds a permission to take forest produce, or cut or remove timber, or pasture cattle[4],

(*c*) who is a servant or employé of the persons (*a*) and (*b*),

(*d*) who is a village officer, or who receives from Government any emolument for services to a community in the vicinity of the forest,

is bound to give information of forest offences, and consequently to inform about any intention to set fire, or the occurrence of any fire, and also to *assist* any police or forest officer demanding their aid—

(*a*) in extinguishing a fire,

(*b*) in preventing a fire in the vicinity from spreading to the forest[5], and

(*c*) discovering and arresting the offender (if one is found or suspected).

§ 8.—*Continental laws on Fire protection:—France.*

It will here be specially useful to enquire what provisions the Codes of continental laws have made for the protection of the forest against fire.

[4] Under the French law (C. F., Art. 145), persons who have bought the timber to be felled and are in possession of the forest to work it out (*adjudicataire*) are made responsible for all forest offences that occur in the forest they are working in, and within a specified distance.

[5] The arrest of fire is often effected by organising lines of men to beat out fire with fresh boughs, in some cases to throw fresh-dug earth on burning grass, &c., for water is rarely available. In other cases men are employed to cut down and clear a strip of forest of all vegetation easily removed, so as to stop the fire by the want of material to carry it on. Sometimes counterfires may be lighted with success; but this (and indeed all proceedings of the kind) require careful watching by a body of men acting under orders.

Under the French Code (article 42), purchasers of the annual cutting[6], their workmen and agents are forbidden to light any fires outside their lodges or huts or sheds under penalty of 10 to 100 francs, besides liability to damages. Burning of charcoal is regulated under article 38 by written order as to its locality.

Article 148 prohibits the kindling of fire (under any pretence whatever) inside a forest or within a distance of 200 *mètres* from it[7]. Lighting a fire contrary to this rule is punishable with fine from 20 to 100 francs. And if a forest fire actually breaks out in consequence, the punishment for mischief by fire under the Penal Code[8] may be inflicted besides damages.

Under Article 149 of the Code For., provisions similar to those of the Indian law are enacted compelling right-holders, &c., to help in case of fire; and in case of refusal they may be deprived of their right for at least one year, or at most for five years; besides being liable to punishment under article 475 of the Penal Code. (This section refers to refusal to help a public servant demanding aid. similar to our own Indian Penal Code, section 187).

Article 151 prohibits the establishment of lime or plaster of Paris kilns, brick or tile kilns, without special permission, within one kilometre of the forest, on penalty of a fine of 100 to 500 francs, and the demolition of the structure.

§ 9.—*German law.*

In Prussia[9] no fire may be lighted inside a forest or in dan-

[6] The trees to be cut in the forest for the year according to the working plan are in France usually sold standing, and the purchaser cuts and removes them; there is a special procedure for the "adjudication" of the "coupe," and conditions as to the removal, followed by a careful scrutiny on the expiry of the time to see that all conditions have been duly observed.

[7] This refers of course to fires out-of-doors, not to fires lighted inside a house which happens to be within 200 mètres of a forest boundary (Curasson, II, 18).

[8] By article 434 of the French Penal Code, a *wilful* incendiary of a *house* or a *forest* may be punished even with death. This of course refers to an atrocious form of crime committed deliberately out of hatred or for motives of vengeance (*Curasson*, II, 404); but an intentional setting on fire of a forest, even with less criminal motive, would be as severely punished as under the Indian law.

[9] *Röhne*, p. 761.

gerous places within five "ruthen" (=a pole or 5½ yards) of the forest boundary.

Tobacco smoking off the public and authorised roads is not allowed in pine forests between 1st April and 1st October. A prohibition also exists[10] against the use of pipes without covers (which prevent burning particles from falling), also against shooting with paper gun-wads which may be smouldering and fall among dry grass. The provisions apply to private as well as public forests. These provisions may be usefully noted for Indian practice.

In Saxony, smoking cigars and pipes without covers in forests is forbidden[1], and the use of flaming matches, as well as kindling fire in any dangerous place, is forbidden. The police are bound to make these prohibitions generally known by issuing notices, advertising in the local newspapers, &c.

As usual, fire may not be kindled at all inside a forest, nor in dangerous proximity to it (*in gefahrbringender Nähe*); the law also prohibits the leaving unextinguished of any fire which may have been lawfully kindled.

The assistance of the whole of the residents of the nearest township or village, as well as that of all forest officials and those employed under the Game Laws, may be demanded: and persons so called on are to bring spades, axes, ladders, &c., which may be necessary for the work of extinguishing the fire, and may also be called on, after the fire is out, to organise a watch for a time to see that the fire is really out and does not break out again[2].

The Bavarian law contains generally similar provisions[3]. Fire may not be kindled in a forest nor within 300 Bavarian feet from it, without precautions to prevent its spreading to the forest itself. Forest officers have a power similar to that in the Indian Act, of prohibiting the carrying or kindling of fire in any shape in exceptionally dry weather.

[10] Id., p. 800. See also Eding, p. 172.

[1] Qvenzel., p. p. 100-103.

[2] *Dorf feuer Ordnung*, Chp. III, § 20 and IV, § 1.

[3] Law of 1852, Art. 45 *et seq.*

The duty of extinguishing fires when done with, is also imposed.

§ 10.—*Austrian law.*

The Austrian law[4] forbids lighting fires in the forest or on the borders (*am Rande*). Anyone who sees a fire left burning is bound to put it out. Passengers going along roads, if they see a forest fire, are bound to give information at the nearest house, and the householder is then bound to convey information to the nearest forest officer, or if there is none, to the nearest local officials. The officials can demand help as under the Saxon law, and are specially empowered (which is useful) to 'take the command' and *issue orders as to what each person is to do* in effecting the suppression of the fire.

§ 11.—*Italian law.*

The Italian law refers the regulation of all matters connected with protection from fire to *rules* to be made by the Forest Committees and submitted to the Provincial Council[5]. When these are agreed on, penalties for their breach may be provided by higher authority.

These rules do not contemplate the actual crime of setting fire to the forest; they merely contain protective and general provisions such as those I have been describing. Actual mischief by fire is prosecuted as a criminal offence under the Penal Code. The rules may regulate the kindling of fire, the burning of weeds or stubble in fields, and so forth, on land contiguous to a forest.

They may also regulate the establishment of lime-kilns, brick-kilns, and kilns for tile-burning; also the manufacture of pitch, rosin, lampblack, pyroligneous acid (made from wood chips), potash, &c., and all other factories and furnaces for which "a copious consumption of wood may be necessary[6]."

[4] Law of 1852, Arts. 44, 45, 46.

[5] Law of June, 1877, Art. 45.

[6] The construction of *chârcoal* pits or kilns (the word used is *aio*, which means a threshing-floor, a barn, or in fact any place of the kind set apart for some special work) and the sheds (*capanne*) for sheltering the workmen are specially mentioned under a separate head.

CHAPTER XIII.

PROTECTION OF THE FOREST AGAINST OFFENCES BY HUMAN AGENCY.

SECTION I.—PROVISIONS FOR THE PREVENTION OF OFFENCES.

Before considering the remedial provisions or punishment ordered for offences actually committed, it is more logical to consider what protective measures can be adopted to prevent or forestal forest offences.

This subject will, however, necessarily be alluded to when we come to speak of the duties of forest officers, so that here I shall only make a passing allusion to the fact that all forest and police officers are bound, if they can, to *prevent* offences, and they may interpose, that is, may warn people and require them to leave off trespassing, or any other act which they are about to commit[1]. Under this head also, as we shall afterwards see, there are numerous preventive provisions, in connection with timber transit, such as registering marks, prohibiting the carrying of marking hammers and other implements of the kind, regulating the establishment of saw-pits, and so forth; as it is convenient to devote a separate section to the subject of timber in transit, these matters may conveniently be left till we come to that section.

SECTION II.—THE LAW UNDER WHICH OFFENCES ARE PUNISHED.

§ 1.—*Punishment of acts committed.*

We are then to enter at once on the consideration of the acts which in forests are prohibited and punished. After arming the

[1] In France the Code has a special preventive rule, which, however, has not been copied in India. It is (Code For., Art. 146)—"Whoever is found in a forest off the ordinary roads or footpaths, armed with bill-hook, axe, hatchet, saw, or other implement of a like nature, shall be liable to a fine of ten francs and to the confiscation of such implement."

forest officer with powers to warn people, to interpose to prevent offences, it can only go further by making certain acts or omissions "offences" which the law is bound to take cognisance of and punish.

The offences are either acts or omissions which are dangerous, and which in fact neutralise the *protective* efforts of the forest staff (such as lighting fires in dangerous places, refusing to give information or help) or are acts or omissions which directly attack and injure the forest itself, or its produce, or amount to theft of Government or private property.

It is the business of the substantive criminal law to lay down, either in a general Penal Code, or partly in that and partly in special laws, the acts and omissions which constitute offences, the punishment to which they are liable, and any circumstances which either excuse the acts and prevent their being punishable by law, or which aggravate them.

The question how offences may be detected, inquired into, and brought to trial, belongs to the domain of Criminal Procedure, and will be dealt with in a chapter devoted to that subject. Some remarks also on the subject will naturally be made in the course of our study of the official duties of a forest officer.

§ 2.—"*Forest Offence.*"

"Forest offence," as defined for the purposes of the Forest Act, means an offence punishable under that Act; but it is by no means intended that there can be no such thing as an offence against the forest, or in some connection with it, unless a special section of the Forest Act can be quoted. The existence of a special law does not (in the absence of express provisions) alter the general criminal law, still less does it render excusable acts done in connection with forest produce or the forest estate itself, which are offences under the Penal Code, though not expressly mentioned in the Forest Act.

In section 66 of the Indian Act (the Burma Act has the same provision), it is expressly stated that "nothing in this Act shall

be deemed to prevent any person from being prosecuted under any other law for any act or omission which constitutes an offence against this Act, or the rules made under it; or from being liable under such other law to any higher punishment than that provided by the rules made under this Act[2], *provided* that no person shall be punished twice for the same offence." Consequently a "forest offence" may be punished either under the Act or the Penal Code according to circumstances.

§ 3.—*Why not all under the Penal Code.*

If it is asked why all offences are not left to the terms of the Indian Penal Code, it may be sufficient to reply: first that, even in the case of offences which, no doubt, comes within the definition of "mischief," "criminal trespass," or "theft," &c., it is a great advantage to have the *specific kinds* of such offences stated in the Forest Act, so that then the most ignorant person may know what acts he must avoid in a forest, without having to reason legally and understand the process by which such acts would be brought within the meaning of a definition of the general penal law. For the general law must necessarily define the offence it punishes, in general or abstract terms so as to cover the great variety of actual circumstances under which the offence might be committed, whereas the Forest Act is under no such obligation, but may individually specify almost all the acts it wishes to suppress. Next is an advantage to have the forest offences grouped under one or two general heads, so that a uniform and suitable standard of punishment[3] may be applied, and also that such offences may be disposed of by a similar summary procedure on trial.

[2] This is evidently a clerical error for "provided by this Act, or by the Rules made under it."

[3] The Indian Acts have provided one general limit of punishment for all forest offences, except one or two which are specially dealt with, and that is six months' imprisonment with fine up to Rs. 500 or both, as a maximum. In Burma, as regards reserved forest, a distinction is made into offences punishable with fine only, and those punishable as under the Indian law. Considering that the Magistrate has discretion in all cases to inflict only a petty fine, if he thinks it sufficient, I see no particular advantage in this distinction

But, besides this, there are offences specially affecting forests which either do not come at all under the Penal Code, or could only be reduced to the terms of that law by a process of argumentation, which might in some cases be technical and unsatisfactory.

This results from the peculiar risks to which forests are exposed and to the exceptional circumstances which exist in respect of forest produce[4].

§ 4.—*Offences which ought to be left to the Penal Code.*

On the other hand, there are some offences so clearly coming under the Penal Code that there would be no object in specially providing for them under the forest law.

For example, any gross theft of wood—beyond the petty acts of illicit cutting which come under the specific terms of the Forest Act—can obviously more conveniently be tried formally under the Penal Code and receive the punishment then awarded to a crime, not merely to a transgression or petty offence. So the offence of "receiving stolen property knowing it to be stolen" is not specifically mentioned in the Forest Act; but it is obvious that an offence of this kind can, without any need of explanation or argument, be

[4] As an instance of a rule due to exceptional risk, I may mention the provision (Section 25c) against carrying fire in a reserved forest except at a season permitted by the forest officer. It would be very difficult to bring this under any section of the Penal Code: (except as a breach of a lawful order made by a public servant), but even so, the forest law would still have to enact that forest officers had power to prohibit carrying fire under certain circumstances; so that it is much simpler to make special prohibition at once in the Forest Act. "Burning lime, charcoal," &c., is an offence in the forest because of the risk, even though the conflagration of the forest, as a direct act of mischief, should not follow.

In a few cases also the exceptional circumstances of forest management make the Penal Code definition inapplicable. Thus a property mark, for the purposes of the Penal Code, refers only to such marks on merchandise or 'movable property, and it would not include a mark on a standing tree. It is necessary for forest purposes to punish the fraudulent use of marks on standing trees as well as on logs, which are 'moveable property' (see Indian Penal Code, sections 479—83.) The provision about counterfeiting marks" also does not, at any rate sufficiently, meet the case of altering one timber mark into another, erasing or defacing marks, which are offences specially to be provided against if timber is to be kept safe during transit.

committed in respect of wood, or other produce having saleable value, just as much as in respect of jewellery or personal effects[5].

Besides offences directly connected with timber in transit which naturally come under the Penal Code there are also many offences, *indirectly* connected with forests, which must necessarily be left to the ordinary Criminal law.

It is then, I hope, clear that under appropriate circumstances the Indian Penal Code, no less than the Forest Act itself, may be invoked for the protection of forests and the produce in transit.

§ 5.—*Practical rule as to when one law and when the other should be adopted.*

It will be well then to collect some practical conclusion as to the use of either law in prosecution.

First, all ordinary and not very grave offences should be prosecuted under the *Forest Act*, but—

(*a*) Graver offences causing serious damage (and where a six months' sentence with or without fine would be insufficient), must be prosecuted under the Penal Code[6];

Theft of wood in transit, and also of wood from the forest where in any considerable quantity or value, should be prosecuted as 'theft' under the Code; and any case of 'receiving' or 'concealing' stolen property in connection with such proceedings, *can* only be so dealt with.

[5] In one case, that of altering or destroying boundary marks, though this is clearly an offence under section 434 of the Indian Penal Code, the Forest Act has prescribed a special and heavier penalty. The reason of this is, that forest boundaries are often specially difficult of protection and their destruction (at such places where building materials are obtained with difficulty and at great cost) is particularly injurious. Damage to such marks is also exceptionally serious because the labor of re-ascertaining the position, &c., may often be very great and old disputes may be rekindled; whereas boundary marks between two fields which in what the Penal Code probably contemplates, are easily and quickly restored without special risk of disputes.

[6] Unless of course, as in section 62, the Forest Act itself has a special and sufficiently severe punishment. These grave cases will usually be prosecuted with the aid of legal advice.

(*b*) 'Abetment' of forest offences must be charged under the Indian Penal Code, with reference either to a section of the Penal Code or the Forest Act, as the case may be;

(*c*) In cases where there has been delay in applying the Forest Act to certain lands under charge of the Forest Department, the Forest Act offences could not be charged: therefore mischief, theft, &c., to the forest could only be under the Penal Code[6].

[6] Unless there is some special law which could more conveniently be used (as in the Punjab Act IV, 1872, section 48).

CHAPTER XIV.

APPLICATION OF THE FOREST ACT TO FOREST OFFENCES.

I may classify the penal provisions of the Forest Act into three groups for the sake of convenience—

(*a*) Offences against the forest itself;

(*b*) Offences specially punished by sections 61 and 62;

(*c*) Cattle trespass;

(*d*) Offences relating to forest produce in transit and drift timber.

SECTION I.—(*a*) OFFENCES AGAINST THE FOREST ITSELF.

§ 1.—*Rules for Reserved Forest.*

Offences against the forest itself are enumerated in section 25[1], as regards permanent forest estates called reserved forests; and the

[1] One of the offences in section 25(*f*), most commonly brought up, is injury to trees. Nothing is said about *stealing* wood; when the cutting, &c., involves a theft of property the offence would be tried under the Penal Code as a theft. As regards injury to trees, the injuries are all grouped together. The French law deserves a comparative study. Here there is the same practical distinction between the cutting or injuring a tree and the theft of the wood; but the *cutting* or *removal* (*enlèvement*) of trees is classified. Trees are divided into two groups (C. F., Article 192), one of valuable hard wood, and the other of less valuable soft wood; the penalty is different for each, and so also in each class the penalty is different according as the tree is over or under 2 décimètres in girth, measured at 1 mètre from the ground. If the tree has been taken away, so that it cannot be measured, the measurement, for the purpose of determining the offence, is made on the stool, which of course is unfavourable to the delinquent, but is justly so on the principle that "the presumption is against the wrong-doer."

If the tree has been sown or planted, and is not more than five years old, there is a special penalty (C. F., Article 194).

A special penalty (Article 195) is awarded for pulling down (*arracher*) or uprooting young plants, which is made more severe if committed in an artificial plantation or nursery.

Special penalties are enacted (Article 196) for "topping" (cutting off the summit—*ébouper*), barking, or mutilating trees. And if the *principal branches* have been cut the penalty is the same as for actually cutting down the tree.

same acts may also become offences in village and undivided forests, and if under section 27, section 36, or section 79, the provisions of section 25 have been made applicable to these forests, as they may be.

There is also a power of making rules under sections 25 and 27. Breach of rules under section 25 would come under the penal provisions attached to section 25. Rules made under section 27 for the management of village forests would not often be penal rules, but mostly directions; if, however, it were necessary, a penalty under section 76 would be imposed.

It should be remembered that an offence under section 25, or rules made under it, can only arise if the forest *is reserved at the time;* that is to say, if the legal procedure of settlement (or that under section 34) has been duly accomplished, and the forest has become a reserve, or if the provisions of Chapter II have been duly applied to the forest under the appropriate sections already mentioned.

The only exception is the offence under section 25(*a*), which expressly alludes to a clearing forbidden while the process of 'forest constitution' is going on.

In Burma, as I have marked, offences which answer to those under the Indian Act, section 25, are classified as regards heinousness and the amount of penalty awarded, into two sets, *viz.*, sections 25 and 26; the two together correspond to section 25 of the Indian Act.

§ 2.—*In Protected Forests.*

Offences against what the Act calls "protected forest," *i.e.*, areas of waste not permanently constituted forest domains, are punishable under Chapter IV of the Act. As in the former case (section 25), a list of acts is given which constitute the offences, and a penalty is provided.

But on looking at this list in section 32, it will be observed that, apart from the fact that the provision does not apply at all till the limits of the protected tract have been notified under section 28, nearly all the offences (except that of setting fire to the

forests (*d*), *depend* on certain declarations having been made under section 29, and on certain rules having been made under section 31[2].

The usual process of protecting a forest tract, which was not "reserved," is first to fix the limits, then to notify the valuable kinds of *trees* as *reserved*, then to issue a *prohibition* against clearing the land for cultivation, quarrying stone, burning lime or charcoal, &c., and lastly to make rules for the general working and utilisation of the forest.

The offences punished by section 32 are—

injuries to *reserved* trees[3], breaches of the *prohibitions*,—breaches of the rules.

§ 3.—*Acts prohibited when not Offences.*

In all the cases under section 25, or section 32, the circumstances which *excuse* an act prohibited should be borne in mind; nothing is an offence under section 25 if there is a rule which allows it, or a *written* (not verbal) permission of the proper forest officer.

Under section 32, nothing is an offence which is done according to a rule or permission as before, or (except in a portion of the forest absolutely closed) in pursuance of a right recorded under section 28[4].

§. 4.—*Rules for lands not reserved in Burma.*

In the Burma Act the 'protected forests' finds no place; consequently all that is provided is that where there is timber, and other forest produce, outside reserved and village forests, and it is necessary to regulate the use of this material, certain trees are

[2] See Chapter X, page 262, on "Rules made under the Forest Act."

[3] Injuring or cutting trees not reserved might also be an offence, if the injury constituted a breach of the *rules* made for forest management.

[4] It is impossible to defend or explain this provision. The attempt to introduce provisions for a record of rights into the chapter on protected waste is most unfortunate, and leads to many difficulties. As no procedure is provided by which rights can be claimed and settled, it is obvious that many rights may exist which are not recorded under section 28; yet such rights, true and lawful as they may be, could not be pleaded as a defence on a prosecution for an act prohibited by the rules.

reserved and certain rules may be made for regulating the removal, cutting, and use of produce generally.

Such provisions are important in Burma, where the whole country is virtually one great forest; scattered teak trees are found here and there over the country on the edges of permanent fields as well as in the jungle, and there are many kinds of bamboos and trees of other forest species much in demand, which may be found all over the country outside the limits of tracts taken up as regular forests. It would never do to leave such trees and other produce to be wasted uncontrolled. Section 36, therefore, protects teak (which are royal trees in Burma), as well as other trees declared to be reserved: and section 37 enables rules to be made for the general prevention of mischief and waste. Of course such rules are enforced only where there has been no written permission to cut, or where there is no *right*.

In section 35, the intention is, while recognizing the existing fact that *all* teak trees, wherever growing, are Government property, ultimately to abandon this right, where the teak trees are found in private lands. What will be done probably is, that Government will utilise and sell the existing stock of mature teak trees scattered over the country, and when nothing remains but small trees, then the Government will abandon its claim to trees on private lands, and the owners will be at liberty to preserve such young teak as remains, for their own benefit.

§ 5.—*Breaches of Subsidiary Rules.*

It is possible that under section 75, subsidiary rules may be made, with reference to some special subject, and breach of these may involve a penalty, which would be under section 76. Such cases, if they occur, will be readily understood and cannot give rise to any difficulty. There is, however, no such section (76) in the Burma Act.

§ 6.—*Absence of certain details in our Rules: disposal of Produce.*

The offences constituted by sections 25 and 32, as regards the forest, depend partly on the requirements of protection, partly on the system of working.

We have not yet any uniform system legally recognized as they have in France. Consequently we are not able yet to specify in the Act those offences against the *system*, which may hereafter require to be prevented.

In France, for example, the method of disposing of the annual timber produce of the State forests is recognized by law. The *plan d'aménagement* or working scheme has prescribed the compartments in which cutting will take place, and the number and size of the trees to be cut. The recognized plan is to sell this "*coupe*" as it stands. The yield is valued by the forest officials and a price put upon it, which is kept secret. The right to cut and remove the yield is then put up to auction, and is only sold if the reserved price is obtained or exceeded. The process of concluding the sale is called the "*adjudication*" and the sale is subject to the conditions of a published "*cahier*" or written schedule of charges, terms and rules. The purchaser is bound as to time, method of extraction, and so forth, as well as to the protection of the trees which are to be left standing in reserve. When the work is over, a minute examination (*recolement*) of the area is made, to see that all conditions have been carefully observed, and that no reserved trees have been touched. This system now works admirably; the severe rules of law necessary to protect the forest have rarely or never to be enforced. A class of traders has grown up, who not only have acquired the exact experience to enable them to judge of the value and character of the "*coupe*"—so that they know exactly what to bid—but they also are a source of strength to the Administration, as they work exactly according to the rules which they are familiar with by practice, and which they never attempt to infringe.

This system being established, the law contains many provisions regarding the "adjudication," fraudulent attempts to concert a price, forest officers and their relations illegally bidding, removal of trees not included in the cutting, substitution of bad trees for good marked in reserve, and offences connected with the *récolement*, &c.

Such matters have not yet found a place in our law.

SECTION II.—(*b*) SPECIAL OFFENCES.

Next come the special offences provided by sections 61, 62. In the first of these sections, the penalty is one threatened as a safeguard against a misuse of authority by forest officers. It will be again alluded to in the chapter on the organization of the forest service. The offences in section 62 have already been alluded to. The necessity for a severe penalty in case of erasure or tampering with, or imitating, marks used in forest work, whether to indicate that trees are to be cut, or are not to be cut, or that timber is of a certain class, or belongs to some one, is obvious. I explained that the Penal Code provisions (in section 483) would not cover the case of *standing* trees, nor in some cases the alteration or erasure of marks: hence a special provision was needed. And so with the offence of destroying and defacing boundary marks; this offence as regards forest marks, is always particularly injurious, and is also very criminal, because no conceivable excuse can be offered for a wanton act of the kind. A special penalty is therefore, as already explained, attached to it.

SECTION III.—(*c*) CATTLE TRESPASS.

The subject of *Cattle trespass* is another instance of a class of injuries specially dealt with by the Forest Act, though reference is still made to the ordinary Cattle Trespass Act. Some observations on these provisions are necessary.

Cattle trespass is an offence, but one in which human agency is only indirectly concerned. If there is a responsible person in charge of the cattle (and this is the reason why, under the head of grazing regulations, I stated the necessity for such a person being appointed) he is answerable to keep the cattle from mischief, and from straying where they ought not. If he is guilty of negligence or misconduct in this respect, he is liable under section 25 (*d*) or 32 (*g* or *h*), as the case may be.

But the cattle themselves may be pounded when trespassing on any permanent (reserved) forest estate, or in a closed portion of a protected area (section 69.)

It was necessary for the Forest Act to specify this, because the general "Cattle Trespass Act" (I of 1871) speaks only of "public plantations," which is not sufficient for forest protection generally.

Another addition to the Act of 1871 was also necessary with reference to forest protection. The fines imposed under that Act may often prove unsuited. For in forests the object is not to graduate the scale of fines solely according to the value of the cattle, but according to the amount of mischief they do in the forest. It is true that the value must *also* be taken into account, otherwise, considering only the damage, the pound-fee might exceed the total value of the animal. The Forest Act then prescribes a scale of fees on this principle, which the local Government may order to be enforced.

For elephants, buffaloes, and camels the fee is heavy, as is the damage done by such animals; and although goats are, as we have seen, far more injurious to a forest than horned cattle, still the small value that they have, makes a fine of eight annas quite heavy enough, all things considered[5].

It will be observed that these *higher rates* are not necessarily in force in all forests, although in *all* forests cattle are liable to be pounded under Act I of 1871, because, as I said, that Act is, in any case, declared to apply. A special order of Government must be issued in order to make the higher scale of fees leviable[6].

[5] The Bavarian law, for the purposes of penalty (Art. 87), puts goats, horses, and horned cattle together, and sheep and pigs separately. The latter are subject to a higher penalty if the trespass occurs during the time of the fall of the beech-mast (because greater damage is then done, the crop of possible seedlings being prevented or diminished in extent). If the trespass occurs in a 'closed' place, the penalty is double. This is an excellent rule.

[6] There are cases in which the grazing in a plantation or forest (especially when artificial irrigation has been used or the soil is "sailaba") is so good that the people gladly let the cattle go to pound and pay the fees. Here would be a good case for ordering the higher scale.

§ 1.—*Features of the Trespass Act.*

In all cases the procedure of Act I of 1871, for the establishment of pounds, the disposal of animals pounded, and so forth, are unaffected, so that it will be desirable for me to call attention to those parts of the Act which are practically of importance to the forest officer.

By section 4, "pounds" (enclosed places in which cattle seized for trespass are detained) may be established at such *places* as the *Magistrate of the district* (subject to the general control of the local Government) may from time to time direct.

Forest officers should therefore apply to the Magistrate of the district when they wish to see a pound established in any place, and should furnish him fully with the information, which will convince him that a pound is desirable, and that it will pay its expenses.

The pound (even if established in a plantation or forest) is under the control of the Magistrate (section 5), and he fixes the scale of charges for feeding and watering the cattle detained, which, of course, are payable beside the punitive pound fee or penalty for the trespass.

The Magistrate also appoints the "pound-keeper" (section 6.) This "pound-keeper" is a public servant. It is his duty (section 7) to keep a register and to enter therein the number and description of cattle, the time of their being brought in, the name and residence of the seizer and that of the cattle owner if known. The person seizing the cattle, is entitled, if he wants it, to a copy of the entry.

All officers of the police are bound, when their aid is requested, to aid the seizer in preventing resistance to the taking or the rescue of the cattle (section 10).

The fines *ordinarily* levied are specified in section 12, and I may repeat that these (as regards forests) are in force always unless a special order has been issued providing for the higher fees under the Forest Act.

When the owner claims the cattle, they are given up to him, on payment of the fine and the cost of feeding. (Section 13.)

If the owner appears, and disputes the legality of the seizure, he must deposit the fine and charges, and get back his cattle, the money being in deposit pending the hearing of his case. (Section 15.)

§ 2.—*Unclaimed Cattle.*

If no one claim within seven days, the pound-keeper informs the officer in charge of the nearest police station, who puts up a notice at his office, and causes the same to be publicly proclaimed; and if within seven days from the date of this again, the cattle still remain unclaimed, they are sold by public auction. (Section 14.)

In any case, if the fine and charges are not paid (either by refusal or omission), or are not deposited (by an owner intending to contest the seizure), the cattle may be sold. The fine and charges will be deducted from the sale proceeds and the balance made over to the owner: it may not, of course, be necessary to sell all the cattle; so many only will be put up as are likely to realise the sum required; the remaining cattle are then restored.

A written memo. of account is also given to the owner in such cases, showing the number of cattle seized, the amount of fine and charges due, the number of cattle sold, the price realised, and the manner in which this was disposed of. (Section 16.)

§ 3.—*Pound Fees.*

Fines recovered from cattle pounded, are credited to the Magistrate of the district (sections 17-18), who has a "pound fund" from which the salary of the keeper and cost of the pound are defrayed. If the fund has an available balance after these charges are met, the money may be devoted to certain useful objects stated in the Act. The Forest Department does not, as is sometimes supposed, get the fees derived from Forest pounds.

When there is a surplus after sale of cattle, and no one claims it, it is kept in deposit for three months, after which it also is finally credited to the 'pound fund.'

The Act prohibits pound-keepers and police officers (and certainly forest officers should be required to obey the same rule) from purchasing, directly or indirectly, any cattle sold by auction under this Act. (Section 19.)

I made allusion to the case of a person objecting to the seizure of his cattle; he can after depositing the fine and expenses lay his complaint verbally or in writting before the Magistrate of the district, or a Magistrate empowered to entertain complaints in the manner provided in sections 20-23, which may be consulted for details when necessary.

§ 4.—*Special provisions.*

The Act also provides (sections 24-28) penalties for forcible opposition to seizure of cattle liable to be pounded, and for rescue of such cattle.

It is provided under the Indian Penal Code that *mischief* may be committed (section 425, illustration *h*), by causing cattle to enter on a field, &c., with the intention of causing damage to crops, &c., or knowing it to be likely that such damage will be caused. When a fine is imposed in such a case, the Cattle Trespass Act provides (section 25), that the fine may be specially recovered by sale of all or any of the cattle by which the trespass was committed, whether seized in the act, and whether they were the property of the offender or only in his keeping at the time.

Section 26 imposes a special penalty for negligent or intentional damage to "any crop or produce of land" or to a public road, by pigs.

Section 27 imposes a penalty for neglect or misfeasance by a pound-keeper: the fine being recovered from his salary.

§ 5.—*Compensation.*

Any fine imposed under sections 25, 26, or 27 may be applied by the Magistrate in compensation for the loss inflicted. Nothing in the Act will prevent a civil suit being brought for damages (section 29). But if any compensation has been recovered under the Act, the amount of it is set-off against any damages awarded in the civil suit. (Section 30.)

§ 6.—*Accidental trespass.*

It should be remarked that cattle ought not to be seized for trespass, nor a herdsman or driver prosecuted, when the cattle have got into a forest by accident, or notwithstanding reasonable efforts to prevent it, nor when they have taken refuge there from a storm[7].

The Hazára Regulation (II of 1879), section 31, contains a provision that if cattle stray off a lawfully used road, without negligence on the part of the driver, they are not liable[8].

SECTION IV.—(*d*) CONTROL OF TIMBER IN TRANSIT AND OFFENCES CONNECTED WITH IT.

The third class of offences dealt with in the Forest Act, consists of offences against timber in transit.

§ 1.—*General Object of the control.*

I may recall to the student's mind, but without repeating them, the remarks which I made at the outset, in explanation of the reason why we were not content with protecting the forest itself, but followed its produce in transit.

Two objects were in view, one, the prevention of theft of timber from the public forests, the other the protection of honest timber traders, whose timber rafted on rivers or floating in single logs and already liable to all the natural accidents of river transit, to loss by flood, and breaking up of rafts, to being stranded 'neeped,' and so forth, is further exposed to more than usual risks from timber thieves and by them to be supermarked, or concealed, cut up, and made away with.

In India, both water and land transport are practised; in some provinces only the latter, but in many both. Consequently, the law has to provide for the control in transit under two widely different conditions.

[7] Compare the Austrian law of 1852, art. 66: but any damage done must be made good.

[8] There is a similar rule in the Saxon law (see Qvenzel, p. 192.)

Both circumstances of transit are, however, included in Chapter VIII (Burma Act, chapter VI).

For the Indian provinces, section 41 provides that the control of *all* timber (which term includes bamboos, dug-out canoes or timber fashioned), and *all* forest produce[1] in transit by land as well as by water is vested in the local Government. In Burma, it has been thought sufficient to control the transit of timber only (section 43): timber includes bamboos.

Such a wide power needs, of course, to be exercised with great discretion; on the other hand, it is absolutely necessary to leave it wide, since no exception is practicable without virtually destroying the provision itself. If some persons could under any pretence, or colour of legal exception, get some defined class of forest produce exempted from the control imposed by the Act, it would be like a small hole in a large cistern, which would effectually prevent its retaining any water whatever. The Government forest would be gradually robbed, and the stolen produce be safely passed out, under

[1] A slight awkwardness may arise here. 'Timber' can be controlled, no matter where it comes from; it may be cut in a field or a private forest or anywhere; the term involves no question as to the place of origin. But the various articles included by definition under the term "forest produce" must come *from a forest*, so that it may sometimes be a question whether the land from which a given batch of produce stopped for examination came, was a "forest" or not. If it was, the produce comes under the section: if not, it is free and cannot be subjected to control. Now the term "forest" has no special or legal meaning assigned to it in the Act. It is, therefore, a question of fact and of the ordinary use of terms. If the material came from a reserved forest, a village forest, or even a tract of forest land under protection, no one would think of raising a doubt that the place was a forest, but in other cases it might be a question whether, within the ordinary meaning of the term, the place of origin was "a forest" or not. Practically, the possibility of such a question does not give ground for apprehending any difficulty. In the case of water-transit this is especially the case, because timber (and bamboos are included) is the chief if not the only thing controlled.

If any considerable traffic existed, or came to exist, in any locality, and it became desirable to place beyond question the power of checking the transit of boat loads of fibre, or thatching-grass, wood-oil, myrabolans, or any other article besides timber, an amendment could easily be made, by adding to the definition of "forest produce" words to say that the term also included 'any specified articles of the kinds mentioned, irrespective of their place of origin, when such articles were by rules made under section 41, declared to be subject to control in transit.'

the pretence that the loads were not liable to stoppage since there is not (as a rule) any external or immediately recognisable indication that timber or other material has come from one forest or another. In the same way, owners of forest produce would get it stolen and safely conveyed away without risk of detection, if only a loophole for escape were provided on the ground that the Act did not apply to *them*. But the safeguards against abuse are ample.

(1).—The control itself is not of an irksome or burdensome character.

(2).—The exact local circumstances can be taken into account, since the precise *extent* of control is not laid down in the Act, but is dependent on rules to be made under section 41, and Government, as the guardian of the public rights, and of the safety and comfort of the people, would not allow rules to be made which could be really oppressive[2].

§ 2.—*Transit by land.*

The control of transit by land is effected under rules devoted to the following points—

(1) The transit may be confined to certain lines or routes, and the use of others, may consequently be prohibited.

This provision, as it stands in the Act, applies both to transit by land and water, although here I am considering that these two kinds of transit are for convenience separated. In the case of rivers, or rivers which have several branches, it is easy to apply such a provision and prevent floating of logs on other streams. But by land it is obviously a question of the local configuration of the country, whether such a provision can be applied. In some places the export lines will be few and no others will be practicable; in others, besides main roads, there may be other bypaths, or even the possibility of traversing the open country at any point. Here

[2] Under the Indian Act rules under section 41 require the sanction of the Government of India,—a further safeguard which, however, is not at all necessary. The provision has been omitted in the Burma Act.

without the (altogether impracticable) aid of a hedge, or a cordon of forest guards, it would be impossible to apply such a provision[3]. When, however, circumstances render the rule desirable and applicable, the export or other "moving" of timber, &c., on unauthorised routes would be illicit and constitute a forest offence.

(2) The rules may require that all produce in transit shall be covered by a "pass."

This pass will be conditional that the produce is to stop and be examined at certain convenient depôts or timber stations, otherwise of course the pass would be of no use, since the material actually in the cart, or cattle load, might not in the least correspond to it[4]. Fees may be prescribed for the passes, and are usually of small amount sufficient to cover the cost of printing the forms, and the pay of timber station establishments. Such fees are prescribed in the rule itself, by the local Government. Under some systems, the passes are paid for at higher rates, in which case the fee represents the royalty or a price of the produce taken from the forest in virtue of the pass, which operates as a 'permit' to go into the forest and collect, cut, or take what the pass specifies, the produce being checked on leaving the forest by comparing it with the pass on reaching an examination post[5].

[3] In such cases the best plan would probably be to say nothing about prescribing routes, but merely (under section 41*e*) to provide for the establishment of depôts for the examination of timber and produce on the most important and commonly used lines. If then people avoided them and found out an alternative line, it would be easy to establish another depôt or set of depôts on that, and so on till all the really and important routes were occupied, which, under the circumstances, is as much as it is possible to do.

[4] It should be borne in mind that in practice this passage of material along certain routes, with pass in hand, soon becomes a matter of well-understood practice and gives no more trouble than getting a railway ticket and selecting the proper line and the right carriage does on an ordinary journey. Exporters of forest produce are always 'habitués;' they understand the routine, and if they are only honest and do not attempt to smuggle or conceal illicitly obtained produce, they are not really troubled by it in the least.

[5] Called "náka" and by other local names.

This system is common in the lower hill forests of the North-Western Provinces, in the Central Provinces hills, and in the Melghát of Berar.

It is easy to see that the evasion of any rule as to getting a pass, producing it, giving it up when done with, and so forth, becomes a forest offence and is liable to punishment.

§ 3.—*Transit by water.*

Transit by water is regulated also by rules (usually called "River Rules") made pursuant to section 41 (B 43). In the Panjáb and in British Burma, this is by far the most important means of transport; but it is also of great importance in parts of Bengal (Chittagong for example), in Assam, and in the North-Western Provinces, as regards the produce of the Himalayan forests, and in Oudh. It involves a much more numerous set of rules, as there are many subsidiary points to be provided for.

The Government is vested by law with the control of rivers[6] *and their banks*, as far as the transport of timber and forest produce is concerned. (For the sake of brevity I shall hereafter speak of 'timber' only—that is the principal article: the transport of other produce, except wood, bamboos, firewood and hollowed-out or fashioned timber, being hardly cared for at all (see note at page 295, *ante*.)

§ 4.—*Control of the Banks of Rivers.*

It will be observed that this section does not claim any special right of property in the banks or any interest in or over the soil; any such right or interest may or may not exist according to the ordinary law of land tenure and interests in land. A riparian owner may prevent timber being hauled up on his land or may have a prescriptive right to levy fees for timber so landed: with that the Act has nothing to do. But the Government officers have the control of the timber, and may prevent it being stored so

[6] "River" includes creeks, cana treams, and generally all water-channels, *natural* or *artificial*. (Definition.)

as to interfere with the passage of other rafts and so forth; and may examine the timber (if the rules so require) or otherwise deal with it. The fact of the banks of the river being private property does not give the proprietor or any one else any 'sanctuary' against the control of the river officer.

In the same way, where power is given by rule (section 41*f*) (B. 43 *j*) to prevent obstructions of the banks, this will be understood to refer to the actual navigating way and to interference with the customary and lawful use of the river and its banks as a public highway, not to any special interference with the proprietary rights of riparian owners.

The general power given by the section to make rules against obstructions in the river, is a very necessary one. Such obstruction is, however, most likely to occur in narrow creeks or arms, and especially in the upper branches and feeders of rivers, where sometimes the falling of a tree across them, or the throwing in of a mass of "toungyá refuse"—bamboos, vegetation and smaller trees from land cleared for cultivation—may prevent the floating of logs, and may cause a "jam" or barrier of logs to be formed, which may be not only very troublesome and even dangerous, but also very expensive to clear.

In nearly all rivers used for floating, logs put into the upper part or into streams and side-feeders, have to be put in singly when they float of their own accord until they reach a broader part of the river when they can be brought under control and formed into rafts. Anything therefore which obstructs the free passage of such logs, is a serious nuisance.

§ 5.—*Lines of transit and Timber Stations.*

The same power which has been noticed under the head of land transport, to fix certain routes and confine the transport to them, may also be applied in the case of rivers[7]. And here also the

[7] This power may be especially needed where the river divides into several channels, and which ultimately lead down to the same place. Those familiar with the Kado Rules (British Burma) will at once recognize the illustration of this which those rules afford.

system of appointing certain 'depôts' or "timber stations," and requiring the timber to be covered by "passes" which are produced, and checked when the timber reaches those stations, finds its most useful application.

In some cases these timber stations at or near the great timber markets, forming as it were the 'termini' of river transit, are of great importance. At Kado, near Moulmein, in British Burma, a timber station of this kind exists, in which thousands of logs of teak and other woods are landed. And as it is arranged for the convenience of traders, that logs may be kept stored there for a time, a complete set of subsidiary rules for the management of the station is provided[8].

§ 6.—*Prevention of Timber Piracy.*

Another very important feature in the business of controlling timber in transit is alluded to in section 41*h* (B. 43 *l.*). This is the prevention of timber piracy. The presence of a number of logs floating about in a stream and often getting stranded for a time when the water level falls, or getting into a backwater; or the fact that a raft has been left at night moored against a bank and may easily be set adrift, these circumstances and many others make river-timber a tempting subject for thieves and dishonest traders in timber.

Either the log can be got out of the river, concealed for a time in the sand or in the long grass that so often fringes the river bank, and then sawn up and made away with; or the mark can be burned out (in which case the mark of fire is easily attributed to the action of jungle fires in the forest), or it can be cut out, the grain being artificially restored; or a mark can be altered so that when the log reaches a depôt it is claimed by the holder of the new mark, and the true owner loses his property, supposing it to have gone adrift, or perhaps to have sunk.

[8] Section 41*i*. (Burma Act, Section 43*h*.)

The rules therefore have to aim at diminishing the facility with which timber can be quickly disposed of by sawing, and hence it is made lawful to regulate, or wholly prevent within certain limits, the establishment of sawpits in localities where it is known that timber is, or easily can be, landed and cut up so that it can no longer be identified.

This provision is chiefly requisite in connection with river transit, but the rules could equally be applied to the establishment of sawpits anywhere where there is the same risk of facilitating timber theft, and they might be applied for example to prohibit sawpits being set up in the vicinity of a forest[9].

Tending to the same object as the regulation of sawpits are also rules which may be made, prohibiting and rendering penal the sawing-up (anywhere), the burning and concealing[10] of timber without proper leave or authority.

§ 7.—*Marking Hammers.*

Then again there is the risk of tampering with the property marks on timber to which I have alluded. The rules may meet this form of river piracy, by making it penal to possess or carry

[9] The French law has similar, and indeed stricter provisions. (See Code Forest: Art. 154, 155, and Curasson, II, p. 19-22, and *Puton*, p. 215.) These indeed existed originally in the Law of 1669. No sawpit (without machinery), Art. 154, or Mill or establishment for sawing (*usine à scier*) Art. 155, can be set up without special authority of the "Government" (since officially interpreted to mean the order of the Prefet) on the borders (enceinte) of a forest, or within two kilometres distant from it. This rule does not apply to establishments forming part of regular towns or villages, which may happen to lie within the proscribed distance; but in such cases (as in *any* case where a "usine" is specially authorised) the timber conveyed into the factory or its yards must be "passed" and marked by a Forest Officer (Art. 158). The Italian law also regulates the establishment of such places ("magazines and depôts for timber and workshops (*opifizi*) for cutting up and converting timber") by Art. 45 of the law of June 1877. The Prussian law (Eding, p. 185) allows also the restriction of sawpits.

[10] This of course can only be done with a dishonest intention. What motive otherwise has a man for burying a log in the sand or covering it with a pile of thatching grass?

marking hammers or tools for altering marks[1], except under certain conditions[2].

§ 8.—*Registration of marks.*

Such rules could not, however, work, unless supplemented by a system of *registering* timber marks: this ensures it being known what mark really indicates the property of one man or another.

For the expense and trouble of such registration, *fees* are charged; and thus the tendency to register more than one mark is checked, while at the same time men of straw are deterred from registering marks, having no timber really, but hoping to steal some from time to time and put their mark on it[3].

Disputes at law are avoided, since the certificate is evidence that such and such a mark really belongs to such a person and indicates his ownership. Moreover, confusion is avoided since the registering officer will refuse to allow a private person to register a mark already registered in favour of another person, or in use by Government officers for Government timber, or which is so like some one else's markthat a few cuts of a chisel or other implement will readily convert one mark into the other.

The registration also diminishes the facilities for using false marks. Supposing, for example, that a timber thief has *en route* cut out the marks on several logs and supermarked them with a

[1] In Burma, they use (among other implements) small combs of metal so that when the original marks have been pared off the surface of the log, the striated appearance or grain of the log may be restored by drawing the metal teeth over the smooth surface of the cut, and then applying a new hammer-mark.

[2] Nor is there any hardship in this. No forest-timber owner can require to wander about the banks of a river with a marking hammer, still less with tools of which the very reason of existence is a dishonest purpose. The proper marks indicating property are necessarily put into the logs in the forest before launching, or on forming the timber into rafts, where the work is done specially and under supervision. If a trader has (exceptionally) reason to fear that a number of his logs have got adrift unmarked, so that he needs to follow them and mark *en route*, he must explain the special circumstances to a Forest Officer and justify the issue of a written permission to him to mark in transit.

[3] For at the time of registration, if such a person were suspected, enquiry might be ordered as to whether he really had timber, and if not, registration might be refused.

spurious hammer, it would be found on reaching depôts that the logs bore a mark not to be found in the register, and such logs would be at once detained and delivery refused.

This, it is true, would not prevent a trader who had registered his mark cutting off another man's mark and putting on his own, but to prevent such offences, the heavy penalty for tampering with marks, or the vigilance of the forest staff as River Police, must be relied on.

The student will perceive that in all these cases the infringement of the rules involves either wilful evasion, for which there is no excuse, or fraud in some shape: therefore the law attaches to the offences the liability to double punishment in the case of second conviction, or if the offence is done at night or after preparation for resistance.

§ 9.—*Special provisions regarding liability.*

To this chapter of the Forest Act certain provisions are attached, the object of which is that Government should be saved from liability for loss of timber in case a flood or other accident causes damage, while the timber is necessarily (or for the owner's convenience as it may be in some cases) stored at or detained at a timber station. (Section 43, and so in the Burma Act also). At the same time such loss may often be prevented if timely assistance can be procured, and so a further section (section 44) gives power to Police and Forest Officers to require the aid of certain persons in these cases. A person refusing to help would be liable to punishment under section 187 of the Indian Penal Code, therefore it is only necessary to impose the duty, but not to specify a penalty, in the Forest Act.

Drift Timber and Salving.

§ 10.—*General Object of the Rules.*

There is another branch of the subject of "timber in transit" to which the Forest Act devotes a separate chapter. I allude to the subject of drift timber.

Ordinarily speaking, timber in transit is under control while it is going along with some one in charge of the raft or in the boat to which it is attached. But timber may get *out of* control and go adrift. It often happens that from the effect of a sudden rising of the river, or from some other accidental cause, rafts get broken up; they strike a bank or an island and go to pieces, and thus the single logs float away without control, or, being deprived of the support of bamboos or lighter logs to which they are attached, sink in the water either at once, or after a time when they have become water-logged. Sometimes they get stranded on islands, and the water subsides and leaves them out of reach, or they may get caught in 'snags' in the river bed.

In many rivers the logs are at first launched singly and left to take their chance till they reach some point where the river debouches on to the plains and becomes a steady flowing river. At this point then the logs can be caught and formed into rafts. Above this point we do not speak of timber as being "drift" or waiting to be "salved," because in the first place the precipitous banks and torrential character of the stream make interference with the timber impossible, except at a few points, at which a look-out can be kept. Moreover, the upper portion of the river is usually entirely in the control of the Forest Officer; no traders or others can get there without his permission.

But it will often happen, too, that when the logs reach the catching-places, some of them will, in spite of all care, go past them, and then they escape control and become drift, so as to require protection under the rules. As logs so stranded or left floating without control, if marked, can ultimately be recovered and their owners found, if *some one* undertakes the charge of them meanwhile, it is obviously necessary that rules should be made to protect such property from being made away with, or from being further carried away perhaps out to sea, and lost.

Moreover, all logs that are *not* marked and so become unidentifiable or "waif," are by the law of the land, the property of *some*

one, whether the "Lord of the Manor," the Crown, or some one else, it is equally desirable that these should not be left to waste and destruction. Hence under the Forest Act, the Government assumes the *primâ facie* right of property in all unmarked timber in certain limits, and a right to *collect* and *manage* all *drift* timber, whether marked or not, and the law provides a procedure, by which the collection of such timber is regulated, and by which its ultimate disposal is arranged for.

§ 11.—*The Law of Waif.*

Although in British territory the Government may, under section 45, declare the *primâ facie* rights of the State to unmarked timber in certain limits, it is nevertheless necessary to understand what is meant by waif, for the right of the British Government to claim waif on its own shores is derived from the right of the former Native Governments. It seems to have been a long standing and well-understood custom among the Native States in the old days that the Ruler is entitled to the waif timber within his boundaries; but this did not prevent the customary appropriation of scraps and fragments of smaller value. Consequently, though the British Government has succeeded to this right in its own territory, the Native States that have river frontage still retain it in their own territories: and as in some provinces, and notably in the Panjáb, many of the rivers which are the regular routes for timber transit are so situated that one or both of the banks lie in foreign territory for some part of the river course, it is important to understand what "waif" timber, which either Government is entitled to claim, really is.

"Waif" depends on the principle which I alluded to in the Chapter on Property. Logs become waif when every one "waives" a claim to them because individual ownership cannot be established[4]

[4] Originally in the barbarous low Latin of the time "*bona waiviata*" were goods abandoned, "waived" or thrown away in flight by a thief who was pursued. Where the owner of such goods was not traceable, they became the right of the Crown, or by grant of the Crown, of the Lord of the Manor.

In the Panjáb, the Ruler of the State whose territory forms the bank, is entitled to the waif, and I have little doubt that the same rule would be held in other provinces.

Several of the Panjáb rivers run through foreign territory, as I said, or have one of their banks foreign. On the Sutlej the Panjáb Government, as the paramount power over the Protected States, laid down (in 1871) the true rule on the subject. It is not the mere absence of a device, or mark in that sense, that makes a log "waif." For example, on the Sutlej it is believed (and this of course is a question of fact) that from no forests but Government forests, could timber in *log* get into the river at all. Consequently all logs, even though they have no Government mark or device, are identified as Government property (especially this is the case with logs cut by the cross-cut saw,) and they are not 'waif' and cannot be claimed by the Chief on whose shore they may happen to be stranded, or within whose boundary they may happen to float.

I presume the same principle would hold good if there were certain forests only of certain kinds of wood, and it was known who owned those forests: logs of this kind of wood would never be held to be waif or unidentifiable.

It is true that on the Sutlej unmarked logs showing root-ends or being broken, not cut, and apparently the result, not of forest fellings but of storms or other accident, are allowed to be waif. Such logs are spoken of as "windfall." In these cases the chiefs are allowed to take the logs as waif[5], but this is rather a matter of concession than of strict principle. They are given up because, though the wood may be the property of Government, they have

[5] The question is sometimes asked, must waif be wood actually cast upon a shore or island, or may the States entitled to waif send out men on floats, &c., to swim after and catch waif logs? There can be no doubt that waif depends on the condition of the log, not on the fact of its being in the water or on dry land. As long as the collection of such waif is made *within the boundary of the State*, that is the only question that can be raised. The boundary may be in the middle of the stream.

not been appropriated or prepared at the expense of Government, and Government do not wish to press the principle of identification too far.

Government claims all waif on its own shores, but usually allows people to take smaller bits for their own use; the limit being what one man can himself lift or carry away without assistance, and *sawn timber being not included* in the permission (or obviously many metre-gauge sleepers and other such small scantling would be carried off).

Under section 45, Government is empowered to exempt any class of timber from its general declaration of *primâ facie* property.

It will probably be asked why the Government should confine its right, to 'waif' within 'certain limits' (by section 45). The answer is, that as regards timber, waif by custom arises in connection with rivers and their banks, but in India river banks are very uncertain things: since, in time of high flood, logs may be taken far inland, and when the water subsides may be left three or four miles or more from the edge of the water. The Government therefore will desire to put a reasonable limit to the area within which it will claim to interfere with waif logs. It is usual under this section to notify the chief rivers under control down to a certain point in their courses, and to specify a certain distance on either side of the water line at its cold-weather level.

§ 12.—*Rules regarding Drift and its disposal.*

Chapter IX of the Forest Act (B. Chapter VII), regulates the collection of drift timber in the first instance, and provides the procedure for its disposal when it is collected. It is customary to speak of "salving" timber when it is adrift without control and floating on its way to the sea where it is almost sure to be lost.

In some cases it may be convenient for Government officers only, to undertake the work: but in most cases it would be a pity that private persons who see logs going past should not be allowed to stop or salve them, and get a reward, provided precautions are

taken that misappropriation is not encouraged under the name of salving.

All this is provided for by rules made under section 51 (B section 51)[6].

It will depend on the rules whether any given individual is or is not justified in salving timber. For it must be remembered that, as a general rule[7], it is no offence in a person to take charge of apparently ownerless property, with the *bonâ fide* intention of securing it and restoring it to the owner: this, however, may be affected by the existence of rules having the force of law, which, in certain cases, prescribe that only certain licensed or authorised persons should interfere with it.

It will be borne in mind that drift timber is still "in transit," and therefore any cutting off of marks, burying, concealing, &c., is punishable as an offence against the rules previously described as made under section 41 (or in some cases against the Forest Act, section 62, or the Indian Penal Code).

Under whatever plan the drift timber is secured, it has to be determined what is to be done with it when salved. This will depend on circumstances. If the logs are salved in the water, they are easily taken in tow by a boat or rafted up to a *drift-timber station* or depôt appointed by the (properly authorized) forest officer under section 45. But there are many cases where this cannot be done.

The section therefore says that timber "*may*" be brought to such depôts. There are cases where floods have left large heavy logs far inland; or where single logs, of perhaps great weight or size, have

[6] I would advise students to procure the rules in force on the Salween in Burma as a good illustration of the practical drafting of rules about salving. If the present practice is maintained, it will be found that there is a certain part of the river where any one may salve, provided he takes out a licence, registers the mark he uses to denote that logs are of his salving, &c. At another part salving is only done by authorized "Government salvers," or the collection is undertaken by official agency.

In Burma, steamers often pick up valuable logs and take them in tow. They then give them up at a drift timber station, and receive the salvage reward.

[7] Indian Penal Code, Section 403, Explanation II.

been carried singly or together below the lowest timber stations, so that it would be inconvenient or costly to do more than secure the timber in some safe place. The rules under section 51 will arrange this, so that the salver may be bound to give notice to the Forest Officer; indeed in any case a landowner on whose land a log was washed would run the risk of being charged with misappropriating the timber[8] if he did not make an attempt to find out the owner or give him the chance of recovering his property. The rules also would enable the logs lying singly where they are, to be treated just as if they had been taken to a drift timber station, and the same procedure regarding claims, &c., to be observed.

§ 13.—*Disposal of Timber.*

When the timber is brought to a station, or is deposited, as just described, the further procedure is so clearly laid down in the Forest Act that explanatory comment is not necessary. Only I may mention, with reference to the right of Government to unidentified timber in the last resort, that claimants should be allowed every chance of identifying their property before it is finally taken possession of as 'waif.'

§ 14.—*Protection while awaiting disposal.*

Timber while it is awaiting the decision which makes it over to some claimant, or while it is retained pending the settlement in a court of law of a dispute between rival claimants, is not liable to any seizure or process of a civil, criminal, or revenue court[9] till it has gone through the legal procedure under this chapter. (Section 47 (B), section 48). This obviates the chance of a collision

[8] See section 403, I. P. C., and explanations. It is quite possible to commit the offence of criminal misappropriation for a time only; whence the necessity of communicating with the proper official. Of course it would be a question of fact whether a person had kept the timber so long or under such circumstances, that misappropriation could be concluded.

[9] In the Burma Act the Civil Court only is mentioned, because practically that is all that is required; no Revenue Court will practically require to attach timber, and if a Criminal Court does, it will be in connection with some offence; and under such circumstances, that there is no object in excepting it.

of authority[10]. After the forest procedure is complete, there is nothing to prevent any Court issuing its order or injunction, or taking the timber under its own process.

§ 15.—*Effect of Forest Officer's decision.*

In deciding claims it will be observed, the forest officer makes the timber over to the person he thinks best entitled. This, of course, has no effect whatever, as a binding decision that such person is really the owner[1]. Any other person might go to law and pursue the usual course and claim against the person who got delivery on the *primâ facie* evidence of his title.

If the Forest Officer cannot decide who is entitled, and so does not think proper to make it over at once to either claimant, he may refer the parties to the Civil Court, and retain the timber meanwhile. In either case the suit must be brought within two months: if not, under section 48, the timber will finally vest in Government, or in the person to whom the timber has been made over, as the case may be. If the timber will vest in Government, the Forest Officer must take his own steps to ascertain the fact of a suit having been brought or not, before he takes possession of the timber.

Nothing is said in the Act about the Forest Officer arbitrating by consent of the parties[2]. There would be nothing to prevent their agreeing to his arbitration, and the best plan would be to proceed under section 523 of the Civil Procedure Code.

[10] I believe that such a difficulty did occur some years ago in Burma. While the Forest Officer was dealing with the timber under rules then in force, the Civil Court interfered, awarded the timber and took it under process of Court.

[1] Nor in a subsequent civil suit could a person appeal to the fact that the Forest Officer had made the timber over to him as a proof that in fact it belonged to him rather than to the other party. But the Forest Officer might be examined as a witness as to any technical or other knowledge he possessed, which might throw ligh on the question of ownership.

[2] In which case the ordinary law (see chapter on Civil Procedure) would apply. It is quite likely that if the Forest Officer is known to have experience, the parties will agree to abide by his arbitration.

The Forest Officer is, however, in no way responsible for this; all that he need see to is that the parties agree in writing to his arbitration, and he may give his decision, leaving it to them to pursue the steps necessary to enforce it. Nor would he be responsible if he made over the timber in accordance with such a decision, because the Act authorises him, in any case, to make it over to the party whom "he deems" entitled to it.

Nor is the Forest Officer liable for anything he does in good faith under the section, nor is Government liable for any loss that may happen during the detention of the timber. (Section 49 (B) 48, 79).

When timber is made over to a claimant, there will usually be a "salvage" fee (provided under rules made pursuant to section 51) due, and possibly other expenses also. No person can claim to take away his timber till he has paid these charges. But no expenses can be so charged (section 50), but such as are distinctly provided by the rules to be levied[3].

If such fees and charges are not paid, sections 81 and 82 of the Act must be brought into play: the Forest Officer may sell the timber and recover the money due.

Offences against salvage drift timber rules are punished by such penalties as the rules themselves provide.

[3] "Salvage fees" consist of a sum which is purely in the nature of a reward for the risk and exertion undergone in saving the timber, whether by Government or private agency. 'Other expenses' will be the actual cost of moving, rafting, or storing timber, and may include a charge the object of which is to defray the cost of any special establishment necessarily entertained.

CHAPTER XV.

APPLICATION OF THE PENAL CODE TO FOREST OFFENCES.

SECTION I.—OFFENCES DIRECTLY CONNECTED WITH A FOREST OR ITS PRODUCE.

§ 1.—*When cases come under the Code.*

We have now considered the offences which are likely to be committed both in the forest itself and against the produce of forests while in transit as far as the Forest Act provides for them. I explained that some of these offences are most conveniently dealt with under the special forest law, while for others, it is desirable (owing to the *gravity* of the case or for some other reason) to have recourse to the ordinary criminal law as contained in the Indian Penal Code. I have now, therefore, to make some remarks on those offences punishable under the Indian Penal Code, which are directly connected with forests, or with their produce in transit.

Ordinary acts of mischief, trespass, petty theft of wood and produce, and offences against produce in transit, are, generally, best prosecuted under the Act and rules under section 25, and sections 32, 41, or 51 of the Forest Act (and similar sections of the Burma Act.) Those rules will suffice where no serious criminality is involved and where the limited scale of punishment contemplated by the Forest Act is adequate. We have, however, seen that many of these Acts *may* constitute an offence under the Penal Code, and where the offence is serious, and special criminality appears, the Code should be resorted to.

And besides those offences which *may come* under the Penal Code, there are also offences which, though directly connected with forests,

can only be dealt with with the aid of the Penal Code. There are also some offences, under the same Code, which are only indirectly connected with forests, but which may concern forest officers to know about.

§ 2.—*Theft and Misappropriation.*

The offences directly connected with forests, which come under Penal Code, are—

Theft or *criminal misappropriation,* with its attendant offences;
'Receiving stolen property;'
Mischief;
Criminal trespass;
Abetment of offences;
Attempts to commit offences.

Theft (section 378) refers always to *movable* property, and it is the essence of theft that the property should be in the *possession*[1] of the person robbed, at the time of the commission of the offence. As far as its being 'movable' is concerned, an act of cutting or separation, which severs an originally immovable article from the ground,—as the act of cutting grass from the soil, pulling fruit from a tree, severing the stem from the root stock,—such an act may have the effect at the same time of making the property movable and of being a theft. That is what the Code means by explaining that the act which effects the severance may also be a moving of the property which constitutes theft.

[1] See on the subject of possession, page 11, *ante.* The student will not fail to recognize the distinction between the offences of theft (378-9), criminal misappropriation (403), and criminal breach of trust (405, &c.) In the first the property is in the *possession* of the person robbed, in the second it is *not* in any one's *possession;* criminal misappropriation may be committed in respect of property found lying on a road; in the third case, the property is not only not in possession of the person robbed, but the wrong-doer is *himself* in possession, or has been entrusted with the property which he converts to his own use; and in proportion as the trust is more complete, the offence is considered as aggravated and is provided for accordingly by different sections, for example where the person entrusted with the property is a carrier (407), or a clerk or servant (408), or a public servant, or banker or agent (409).

If the property is not at the time in possession of any one, as if a log is laying on a river bank or island, or a bundle of grass by the roadside, then the offence is not theft but *criminal misappropriation.* (Section 403.) The "explanation" attached to this section in the code to this offence should be remembered. In the first place, a dishonest[2] misappropriation or conversion to a man's own use for a *time* only may be an offence. Supposing, for instance, a person having salved a log of teak should keep it in his yard and make no attempt to inform the Forest Officer, or to find the owner, this might be, according to the circumstances, a misappropriation punishable under section 403. It would be a question of fact whether the detention was for such a length of time as was not natural or necessary, supposing the accused person to have had an honest intention of finding the owner or a forest officer.

This example also includes the second explanation, which is that it is not misappropriation in the first instance, to take possession of property for the purpose of protecting it and restoring it to its owners, but it becomes an offence, as just stated, if within a reasonable time steps are not taken to give notice, or discover the owner.

It is not necessary that the finder of property should know who is the owner, or that any particular person is owner: he misappropriates it if he does not believe it is *his own* (and then makes no attempt to discover the owner.)

In ordinary cases, when no owner can be found, there cannot be a misappropriation, because then the thing really becomes "*res nullius.*" If I find a rupee lying on the high road (unless, of course, I have seen some one drop it, or there is some special exceptional probability to guide me), I may keep the rupee, since it is obvious that to find an owner is impossible. Under the Forest law however, as regards timber in transit, this excuse would rarely

[2] "Dishonest" by definition means an act which causes either "wrongful gain" to one party or "wrongful loss" to another, or both. "Wrongful" in this phrase means gain or loss which the person is not legally entitled to enjoy or to suffer, as the case may be.

avail, since Government is declared by law to be *primâ facie* owner *of all* unmarked, and drift timber, within certain limits.

A man could not, for example, pick up a sleeper lying on a sand bank, and say I may take this because it is so exactly like thousands of other sleepers that it is impossible for me to find an owner, for the owner is, by law, the Government.

Cases of *breach of trust* (sections 405-6) can hardly occur except in cases of contract to remove timber; but this is not really a direct forest offence, so I shall mention the subject afterwards.

§ 3.—*Receiving Stolen Property.*

Closely connected with theft is the offence of "receiving or retaining" stolen property, knowing or having reason to believe that the property is stolen.

This is an offence which, not being specifically mentioned in the Forest Act, must be prosecuted under the Penal Code. Any property the possession of which has been transferred by theft, extortion, or robbery, or which has been criminally misappropriated, or in respect of which a criminal breach of trust has been committed, is "stolen property." (Section 410). "Dishonestly" receiving or retaining this is punishable under section 411. And there are other sections following, which may also be applicable, for example the habitual dealing in such property is punished under section 413: and assisting in the concealment under section 414[3].

To sustain a charge of 'receiving' it is necessary to show (1) that the receipt or detention was *dishonest* (*i.e.*, with intention of causing wrongful loss or wrongful gain); this fact is usually to be inferred from the circumstances of the case; (2) the offender

[3] Under section 414 could be tried a bad case of "concealing" timber (see Forest Act, section 41 *h*), which would be insufficiently punished with six months' imprisonment. The section 414 provides for cases which are in fact very like the abetment of section 411. The accused does not himself 'receive' the stolen property, but he helps some one else in disposing or making away with it. As where a goldsmith melts down silver coins or ornaments for a receiver (knowingly) and so helps the thief or some receiver to conceal and dispose of his booty.

either knew or had reason to believe that the property was stolen, or obtained by misappropriation, &c. This is also usually to be established by the circumstances, such as the time and means of getting possession (whether at night, in secrecy, taking it at very much below its value, &c.,) the way in which he dealt with the property afterwards (such as burying or concealing it, &c.). These matters afford indication of guilty knowledge. Especially important is the common case where the accused cannot or will not say, how he came by the property[4].

§ 4.—*Mischief.*

Mischief is an offence defined by section 425, Indian Penal Code. To constitute it, there must be an *intention* to cause, or a *knowledge* that it is *likely to cause,* wrongful loss or damage to the public or to any person.

It is obvious that mischief may be of various classes, and so be of different degrees of criminality, according to the *means* employed in producing it, according to the *value* of the property injured or destroyed, and according to the nature or *public utility* of the property damaged.

[4] A very common mistake is the misapplication of section 411 in the following way. One of the commonest forms in which a theft case comes up is this: A has lost his cattle, timber, &c.; he has not actually seen any one steal it, but shortly after the loss, the property is recognized in the possession of B, who is either utterly unable to account for the possession, or else tells falsehoods about it. In that case the charge is under section 379, &c., and the inference is that he himself *stole* it, and not that *some one else stole* it and he *received* it (which is section 411). This is also the French law, that any one found in illicit possession of newly cut wood is presumed to have cut it). Curasson, II, 421; see also Mayne's I. P. Code, (9th ed.) page 311 and page 335. I laid emphasis on *recent* possession above because if it was only after the lapse of a considerable time that the property was discovered, there would be so much reason for probability of previous transfer and so forth that the inference (if any at al was justifiable) would be of 'receiving.' On this subject section 114 of the Evidence Act may usefully be referred to; the principle on which the rule proceeds is, that it is right to presume what is likely to have happened, regard being had to the course of natural events, human conduct, &c., in relation to the facts of the case.

Mischief relates to *property* (including animals), not to *men*. Offences against the human body—*murder*, causing *grievous hurt*, causing *hurt*, use of *criminal force* and *assault*, are treated under a special chapter in the Code.

Mischief in general, is punished by section 426. Recourse in forest cases would not be had to this section, because the minor forms of mischief (adequately punishable with fine or with imprisonment up to six months) are all specified in the Forest Act itself.

Mischief where the damage amounts in value to 50 rupees and more comes under section 427; and mischief by fire with intent (or guilty knowledge) of causing damage to the extent of 100 rupees value or upwards is punishable (the imprisonment may extend to seven years, with fine also) under section 437.

This section would be resorted to in grave cases of mischief by setting fire to a forest.

Mischief to landmarks (section 434) would usually be better charged under the special section (62) of the Forest Act.

Mischief to irrigation works, or water-supply works (of any kind and for any purpose) and mischief to roads, bridges, navigable channels, come under sections 430-1, and mischief to cattle (according to value) under sections 428-9.

§ 5.—*Criminal Trespass.*

Criminal trespass may be just mentioned, but it is not likely to be applied to forest cases, because the specific acts of trespass on forest property are provided against in the Forest Act. The section in the Indian Penal Code is 441. The offence consists in entering on property in the *possession* of another, with *intent* to commit an offence[5] or to intimidate, insult, or annoy any *person in possession of*

[5] Which here means an offence against any law if punishable with six months' imprisonment or more, since section 441 is one of the sections included in section 40 of the Indian Penal Code, which gives this extended meaning. As regards *possession* the student will observe another instance of the imoprtance of mastering the general principles of law, and why we spoke of *possession* at the outset. The Government is in possession of a demarcated or notified forest, and the guard or other officer on duty in it, is clearly also in possession.

such property : it also includes an unlawful *remaining*, with such intent, though the original entry may have been innocent.

Trespassing simply, i.e., without such intent, would not be punishable under the Indian Penal Code; but as it is undesirable to allow it in a reserved forest, where it is sure almost, to be the prelude to some forest offence, it is specially prohibited by the Forest Act, section 25*d*.

Under the Indian Penal Code, criminal trespass effected in a house or building develops into "house trespass;" and if with precaution for concealment, into "lurking house trespass" (sections 443-4): if it is accompanied by an entry by a passage made by the offender, by opening a lock, by use of force, &c., &c., it becomes "house-breaking" (sections 445-50).

§ 6.—*Attempts.*

There are two remaining points connected with this part of our subject which may now be considered. It sometimes happens that a would be offender is stopped by some circumstance before his act has been fully accomplished. But it is obvious that his intention is just the same as if he had done the act, and the menace to society is the same. The criminal design is there, and everything else, except indeed the opportunity to carry the design into complete execution. The law therefore deals specially with inchoate crimes, which it calls "attempts."

The mere design or contemplation to commit an offence is not an attempt, nor is precedent preparation, without any act towards the offence; preparing a rope ladder which might be used in some subsequent house-breaking, for instance, would not be an 'attempt' at house-breaking. It is, however, not easy in all circumstances to say where the line is to be drawn between preparation for an offence, and those partial acts in prosecution of the offence itself which really constitute an "attempt." In America, a rule (which is certainly a very good general guide) has been laid down, that an attempt can only be said to take place where there have been "acts which would, and in the consummation

of the offence, but for the intervention of circumstances independent of the will of the party."

The facts of the particular case require to be studied in order to determine whether there has been an *attempt.*

In some cases of grave crime, as rebellion and murder, attempts are specifically provided for as separate offences in the Code. But where this is not so, all "attempts" are punished under section 511.

The Code does not define an "attempt," but requires that to make an "attempt" penal *some act must be done towards*[6] *the commission of* the offence. And in general the punishment for an attempt is half that provided for the offence itself (of course in the absence of any special provision).

It is only an offence *punishable under* the *Indian Penal Code,* the attempt to commit which is punishable. "Attempts," therefore, in the case of lesser forest trespass and mischief should not be prosecuted[7].

It is only where the offence is serious, and would be clearly punishable under the Indian Penal Code, that a case of "attempt" could be successfully prosecuted.

§ 7.—*Abetment.*

Abetment may occur in forest cases, because the Indian Penal Code (section 108) speaks of abetment of an "offence," and the term here is explained, by section 40 of the Code, to include all offences whether punishable under the Code or under a special law, and irrespective of the amount of sentence to which they are liable.

Hence there was no occasion to make a special provision in the Forest Act regarding Abetment.

It is immaterial to the *existence* of the offence of abetment whether the principal offence is actually committed in consequence of

[6] Here read the illustration to section 511, Indian Penal Code.

[7] Attempts are in the French law punished as the crime itself (Code French 2-3) but no attempt is recognized as punishable if it is an attempt at a *délit* (a forest offence for example not coming under the penal law as a *crime*) unless some special law declares the attempt penal (*Curasson*, II, 429).

the abetment or not (section 108, explanation II), but this result *is very material* to the question of amount of punishment, as we shall see.

It is also immaterial that the principal offence is excused by any want of legal capacity to commit an offence in the person who did it. Thus a murder by a madman would be excused, but the abetment of such a person would be an offence all the same. (Section 108.)

The circumstances which constitute an abetment which the law recognizes, had best be learned from the very words of the section 107 itself with its two explanations and illustration. It runs as follows :—

"107. A person abets the doing of a thing who—

"*First.*—Instigates any persons to do that thing; or

"*Secondly.*—Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

"*Thirdly.*—Intentionally aids, by any act or illegal omission, the doing of that thing.

"*Explanation.*—A person who by wilful misrepresentation, or by wilful concealment of a material fact, which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Illustration.

"A, a public officer, is authorized by a warrant from a court of justice to apprehend Z. B, knowing that fact, and also that C is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C.

"*Explanation* 2.—Whoever either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act and thereby facilitates the commission thereof, is said to aid the doing of that act."

If there is no special penalty for abetment[8], section 109 provides that if the offence *is* committed in consequence of the abetment the punishment is the *same* as for the offence itself. (See also the explanation at the end of section 108.)

[8] There is in a few cases, *e.g.*, abetment of suicide, abetment of murder, &c.

It sometimes happens that an act is abetted, but the act actually done has a different result or effect legally: the abettor is just as much liable as if he had directly abetted the act accomplished, provided that the result which actually followed was a probable consequence of the abetment and was committed under the influence of the abetment. (Section 111)[9].

If the offence is *not* actually committed, then if it is a grave offence punishable with death or transportation for life, the abetment is specially punishable under section 115. If it is a less offence punishable with imprisonment, the abettor may receive sentence of one-fourth of the longest term of imprisonment provided for the offence, or fine as provided for the offence, or both; and if the abettor is a public servant, whose duty was to prevent the offence, the sentence may be double, *i.e.*, may extend to *one-half* the term of imprisonment. (Section 116.)

There are some special cases connected with abetment, provided for in sections 112, 113, &c., which it is not necessary for the forest student to enter into.

It is important, however, to note that under section 114, if a person who would, if absent at the time of committing the offence, be liable as an abettor only, is *present* at the commission, he is treated not as an abettor, but as a principal. (See also Indian Penal Code, section 34.)

SECTION II.—OFFENCES INDIRECTLY CONNECTED WITH FOREST ADMINISTRATION.

§ 1.—*Scope of the Section.*

Of the offences under the Indian Penal Code, *indirectly* connected with forest administration, *i.e.*, likely to occur or to come within the range of a Forest Officer's practice as such, I may mention the principal:

[9] An illustration is afforded by the case of A instigating the burning of Z's house by B. B acts on the abetment, but taking advantage of the fire, commits a theft of property in the house. A is responsible for the abetment of the burning, but not the theft, for that was not connected with the abetment by instigation.

§ 2.—*Unlawful Assembly.*

In the first place, any offence may be committed by more than one person: this in most cases constitutes a case of *abetment* of which I have already spoken: but if *five* or more persons assemble with the object (among others contemplated by the law) of *resisting the execution* of the Forest *Law*[10], or by *means of criminal force*, or *show* of such force, of *compelling* any one to do what he is *not bound* to do, or not to do what he *is legally entitled* to do, or *depriving any person* of the use of any *forest right* or of *enforcing any right* or *supposed* right), or with the object of *committing an offence* (an offence against the Indian Penal Code or under any special law, if punishable with imprisonment of six months or more (section 40) :—such assembly is called an "*unlawful assembly,*" and is punishable under sections 141 to 143. It is not necessary that any *results* should have followed: the assembly, for the purpose indicated is illegal, and joining it is a punishable offence *per se*, which is aggravated (section 144) if the party is armed.

§ 3.—*Giving aid and information.*

We have spoken already of the duty laid on certain persons to give information or render assistance in forest cases, &c. (see Forest Act, section 78, &c.).

A person so legally bound, and intentionally omitting to give *information*, would be punishable under section 176, Indian Penal Code, or to give *assistance*, under section 187.

He would come under section 177 if the *information* given were such as he knew, or had reason to believe, were *false*[1].

Under section 201, Indian Penal Code, if *any* person, knowing, or having reason to believe, that an offence under the Indian Penal Code (or may be under the Forest law if punishable with six months' imprisonment or more) has been committed, *causes*

[10] I purposely select *forest* instances: but of course the Indian Penal Code is general.

[1] Also under sections 202 and 203, which are almost precisely the same as sections 176 and 177. I do not know why these provisions were thus virtually repeated twice.

any evidence to disappear, or gives false information, *in order to screen* the offender, he is liable to punishment.

§ 4.—*Giving False Evidence.*

Giving *false evidence* (sections 191 to 195) is an offence which is unfortunately likely to occur in forest cases; but inasmuch as on such an occurrence in a forest trial, the Magistrate or Court would take action, it is only necessary to refer the Forest Officer to the sections of the Code.

§ 5.—*Concealing Offenders.*

The harboring or concealing[2] offenders, as a step calculated to defeat the ends of public justice, is an offence under the Indian Penal Code, section 202. The "offender" must, however, have committed, or been charged with, an offence under the Indian Penal Code, or under any special law punishable with imprisonment for six months or upwards.

§ 6.—*Breach of trust.*

A case under this head sometimes occurs, when a contractor has been employed in the forest, to saw up the trees felled, and launch them in certain scantling forms, into the river. It may happen that it pays him well to remove the lighter scantling which is conveniently situated, but larger pieces at a distance from the river may be expensive and troublesome to move. He is then tempted to conceal, burn, or otherwise destroy this timber, so as to avoid the duty of launching it.

Here it will be observed, the offender does not convert the timber to his own use (section 405), but he does violate the further clause of the same section, namely, he violates the express or implied terms of the contract[3] under which the timber was made

[2] Husband and wife can *never* be charged with 'harboring' one the other.

[3] A person commits a breach of trust when he violates—

(*a*) any direction of the law,—

(*b*) any express legal contract,—

(*c*) any implied legal contract;—

as to how he is to discharge his trust. (*See* section 405.)

over to his charge. He can then be prosecuted for breach of trust, to say nothing of a further charge of mischief.

These, I think, will be found to be the principal offences likely to come under the Forest Officer's business, which will require reference to the Penal Code. I ought perhaps more specifically to have alluded to section 409, as applicable in case a clerk or a forest subordinate make away with cash or property of Government. But this subject, I think, will be understood from the note which I appended to my remarks on the subject of theft. Certain offences *by* Forest Officers are more appropriately reserved to the chapter on Forest Officers and their duty.

CHAPTER XVI.

GENERAL PRINCIPLES OF CRIMINAL LAW RELATING TO OFFENCES.

SECTION I.—GENERAL EXCEPTIONS.

§ 1.—*Acts that would ordinarily be Offences are excused in some cases.*

In the Indian Penal Code there are a number of sections which lay down certain principles regarding all offences. In the Indian Penal Code the word "offence" is defined to be an act or omission punishable *under that Code:* but an important section (40) extends this meaning to *all* offences, in the case of a number of sections, and to offences under special[1] and local laws, if punishable with a certain amount of penalty (six months' prison and upward, with or without fine) in the case of some other sections.

As many of the sections mentioned in section 40 lay down important principles, and these principles are applied to forest offences as well as others, it is necessary for us to study them.

I have had some doubt whether I ought to place this chapter first or last. I have concluded in favour of the latter position, not because it is most logical, but merely because it is most easy for the student to master first the general subject of forest protection, and the offences which arise on the breach of the provisions of the law, whether Penal Code or Forest, and that *then* he should be made aware of those circumstances (which will at once make themselves understood as soon as they are stated, but) which, in all cases where they arise, produce their natural effect in excusing the offence, or taking it out of the category of offences altogether.

[1] The Forest Act is a "special law," *i.e.*, a law devoted to a special subject. A "local" law is a law which has force only in a special locality. The Hazara Forest Regulation (II of 1879) for example is both "special" and "local." (Indian Penal Code, sections 41, 42.)

I shall not give the whole of Chapter IV of the Penal Code, but select those parts that are most useful. The whole chapter may, however, be read with advantage.

§ 2.—*Act done under mistake of fact.*

There are circumstances in which acts, which might otherwise be offences, become legally excused.

The first is noted in Indian Penal Code, section 76, where an act done is one which the law binds the doer to perform, or is believed to be in accordance with such legal duty, though really, owing to a *mistake* of *fact* (*not* of *law*), it is not warranted[2]. For example, a forest guard is bound by his public legal duty to arrest X. This is no offence. Not only so, but if by mistake of fact, believing Y to be X, he arrests Y, he has still committed no offence.

Sections 77 and 78 I pass over, as they relate to acts done by Judges and Courts of Justice.

Section 76 referred to cases where the doer of the act was bound by law (or believed himself to be so under mistake of fact) to do the act. Section 79 refers to similar cases where he is not *bound* to do the act but still is *justified* by law, or where the person under a mistake of fact (as in section 76) believes himself to be justified.

Example.—B, a private person, seeing an act done by A, though the act may be an offence of some kind, would commit an act of unlawful restraint or criminal force in arresting the person; but if, under a mistake of fact, B supposed that A's act was in fact a murder[3], he would be legally excused if, acting *bonâ fide* under the mistake, he arrested A.

[2] It is a well-known principle (admitting of no proof to the contrary) that every one knows the law. It is not true as a fact that every one knows, or can know, all the law: but it is equally true that if in ordinary matters a man were allowed to plead, for example, that he did not know it was forbidden to steal, the business of daily life could not go on. In cases where the provisions of the law are artificial, the Magistrate can always by his lenient sentence make any practical allowance for the effects of *bonâ fide* ignorance or mistake.

[3] In some graver cases, as murder, *every one* has a right to arrest the offender.

§ 3.—*Accident or Misfortune.*

Section 80 runs as follows :—

"80. Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge, in the doing of a lawful act in a lawful manner, by lawful means, and with proper care and caution.

"*Illustration.*—A is at work with a hatchet, the head flies off and kills a man who is standing by. Here, if there was no want of proper caution on the part of A, his act is excusable and not an offence."

No comment is needed on this.

§ 4.—*Act done to prevent other Mischief.*

Section 81 is an exception of the same nature :—

"Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property.

"*Explanation.*—It is a question of fact, in such a case, whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse the risk of doing the act, with the knowledge that it was likely to cause harm."

An illustration might occur in a forest where, in case of a fire, a Forest Officer or other person should in good faith light a "counter-fire" with a view to burn up a strip and so prevent the original fire spreading.

Illustration B, given in the Code, also gives a typical case:

"(*b*) A, in a great fire, pulls down houses in order to prevent the conflagration from spreading. He does this with the intention, in good faith, of saving human life or property. Here, if it be found that the harm to be prevented was of such a nature and so imminent as to excuse A's act, A is not guilty of an offence."

§ 5.—*Act done of Necessity.*

In connection with this exception must be noticed the case of a man doing some harm to others to prevent injury to himself. May a man, for example, steal food to prevent himself from dying

of hunger? It is held in such a case that a legal offence is committed, though, of course, a Magistrate might mitigate his sentence according to the circumstances.

Under this head also would come cases where acts are committed of necessity, as where cattle are driven into a forest to seek shelter from a sudden storm, or where persons overtaken at night in a forest, cut wood and make a fire to save themselves from suffering by cold or to scare away wild beasts.

A technical offence is committed; but in such a case, of course, a prosecution would not be instituted; if it were, and this defence appeared true, a merely nominal sentence would be awarded[4].

§ 6.—*Acts by Children, Lunatics, &c.*

The next series of exceptions relate to personal defects, as regards age and understanding, which render the act no offence.

Sections 82 and 83 provide that nothing is an offence if done by a child under seven years old[5], or by a child over seven years but under twelve, if (as a matter of fact to be enquired into at the trial) it does not appear that the child has attained "sufficient maturity of understanding to judge of the nature and consequence of his conduct *on that occasion*" (*i.e.*, the inquiry must go to the fact of his being able to understand the nature and consequences of the particular act with which he is charged).

Section 84 refers to cases where the person committing an offence is excused by reason of "*unsoundness of mind,*" which means incapacity to know the nature of the act, or that the act is "either wrong or contrary to law."

I cannot enter into detail on the subject, but I may state generally, that the person who sets up this defence (or on whose

[4] By the Bavarian law of 1852 (Art. 60) as regards forest offences, acts done under demonstrable necessity cease to be punishable, but the person so acting is found to report the case to the Forest Officer within 24 hours, and to make good any damage he may have occasioned, by a money payment. The Austrian Forest law (Art. 66) has similar provisions regarding cattle trespassing of necessity, *e.g.*, to seek shelter in a storm.

[5] Some good remarks will be found in Mayne's I. P. Code (9th edition), p. 67.

behalf it is set up) must prove it, and that the essential requisites are clearly stated in the section. Not every hallucination or delusion or partial insanity will excuse: it must be shown that at the time, the offender was absolutely incapable of knowing the nature of the act, or that it was wrong or contrary to law.

§ 7.—*Under influence of Intoxication.*

Section 85 refers to the case of *intoxication.* This does not excuse an offence if the intoxication was voluntary; but it is a good defence if some drug or intoxicating substance has been administered without the accused person's knowledge or against his will.

Section 86 adds some further provisions on the subject of intoxication, which need not be detailed.

§ 8.—*Acts done by Consent.*

Sections 87-93 I shall pass over. They relate to cases of harm done by consent, and to the case of injury caused by making a communication (which may alarm or affect an invalid, &c.); these matters can hardly come within a Forest Officer's cognizance. But it may be proper to remark that it is on this same principle that the acts prohibited in forests become excused—*i.e.*, are not offences—when it is shown that the Forest Officer had given permission, or that a properly-recorded *right* justified the doer.

In order to prevent such a plea being raised unjustly, and thus giving rise to difficulty in ascertaining the fact, it is usually provided that the permission must be *in writing,* so that there can be no doubt about it. It is *never* difficult for the Forest Officer to give a few written lines signed by himself, in all cases where he permits the removal of any produce, &c.

And in the same way, the cutting of trees (for example) which would be an offence if done by any ordinary individual, is not an offence when done by the Forest Officer or the contractor, coolie, &c., working under his orders, as his agent. For the Forest Officer is clearly acting within his *rights,* as representative of the owner (the Government, &c.). There is no need, therefore, in such sections

as 25, &c., to say that the cutting, &c., which is prohibited, is excused when done by the owner himself—for that is what it comes to, when the Forest Officer does it.

§ 9.—*Acts under Compulsion.*

Section 94 may be briefly noticed. It refers to cases excused by reason of *compulsion.* The Code itself may be referred to as to what amounts to 'compulsion.'

§ 10.—*Acts of very Trifling Character.*

Section 95 should be noted[6]. The object is to take out of the category of criminal offences, those petty and trifling acts which, though strictly within a definition of crime or offence, are yet of such a kind that the "harm is so slight that no person of ordinary sense and temper would complain of such harm." In a case reported in Ind. Law. Rep. V. Bombay (Criminal Cases), page 35, a person had been convicted of stealing from a bit of forest land (it happened to be a private forest, but that does not affect the point) a few pods of some tree, worth 3 pie; the conviction was quashed under this section. It would be otherwise, if the act was really *a part* of an act of graver character, *e.g.*, a thief may have got access to a lot of property and yet had time only to appropriate a very small quantity. I recollect a case, where a notorious burglar had broken into premises hoping to find a rich booty but only succeeded in carrying off a bit of old iron quite worthless; he was rightly given a heavy sentence.

§ 11.—*Act done in Self-defence.*

The rest of this fourth chapter (General Exceptions) (sections 96-108) is taken up with the subject of the "right of private defence'

[6] I have occasionally noted forest cases which should, in view of this section, have never been prosecuted. It is very desirable to avoid making forest conservancy more obnoxious to the ignorant peasantry than in the nature of things it must be; and a wise discretion should be exercised in filing a criminal complaint of a forest offence if it is really insignificant, or a warning would suffice. Stripping off leaves from a tree is a forest offence, because such an act may cause the death of, or serious injury to, the tree, but obviously it would be unreasonable to punish a man for picking off a single leaf; yet as the plural includes the singular, such a prosecution would be possible except for this section 95.

which, as everybody knows, excuses acts of violence, and even causing death of an aggressor, *under certain circumstances.*

The right extends to the defence of one's own person, and that of any one else, and also to the defence of one's own (or any one else's) property, under the proper circumstances in each case.

I shall not enter into this subject, but merely remark that no right of private defence exists against any act (which is not a murderous attack causing "apprehension of death or grievous hurt[7]") when done by a "public servant acting in good faith under colour of his office," and that, even when the act is not (as may turn out on argument) "strictly justifiable by law." (Section 99.)

A public servant, who is obliged to proceed to the use of force in arresting, or to make a search, or indeed in any act in which he makes use of legal force, should always be prepared to show his warrant (if it is a case where such a warrant has been issued), and should wear his uniform or official badge, or whatever it is, so that there may be no doubt about his being a public servant in the execution of his duty. This is necessary, because the right of private defence is not taken away as just stated, unless the person exercising it *knows, or has reason to believe,* that the public servant acting against him *is* such.

§ 12.—*Responsibility of one Person for act done by another.*

I may take occasion, while still dealing with the general exceptions, to mention a fact which is not stated in the chapter we are considering, because it is a general principle of law, and not one immediately referring to acts done by a person.

No one is *criminally* liable for any one else's act, merely by reason of a relation subsisting between them; although of course he may be liable to civil damages. A master, for instance, is not responsible for a forest offence done by his servant (unless, of course,

[7] "Grievous hurt" has a technical meaning in the Code (see section 319). It refers to all acts permanently injuring or maiming, permanent disfiguration of the head or face, breaking bones or teeth—any hurt which endangers life or disables the sufferer, or keeps him in severe bodily pain, for 20 days.

he knows of it or *abets* it, but that is quite a different matter. I allude here simply to any possible responsibility on the sole ground of the relationship which exists; nor is a guardian criminally responsible for his minor ward's offence[8].

SECTION II.—CIRCUMSTANCES AGGRAVATING AN OFFENCE.

§ 1.—*Enhanced Punishment under Special Circumstances.*

Just as there are circumstances under which acts which would otherwise be offences are excused, so there are circumstances under which criminal acts are aggravated or their legal character changed.

In the Forest Act no attempt has been made to provide for the specific increase of punishment on the ground of aggravating circumstances, except in the one instance of punishment of offences against the rules for the control of timber in transit, made under section 41 (B. section 43). Section 42 (B. section 44) provides that if the offence is committed, (*a*) after sunset and before sunrise, or (*b*) after preparation for resistance to lawful authority[9], or (*c*) in the case of a second conviction of a *like* (not necessarily the same) offence, the punishment may be doubled. In these offences there always is an amount of fraud and criminality of purpose for which no excuse can be found. Ignorance, or the wants of the moment, may tempt a man to steal some forest produce, without there being any deliberate or habitual crime: but no one who tries to steal wood while it is floating towards its destination, or who alters property marks on it, or buries it in the sand to enable him afterwards to remove it, can plead such an excuse.

[8] It would appear that some of the Continental laws adopt a different principle. The Bavarian law (Art. 68), if I understand it rightly, makes them criminally liable, unless they can prove that they were not in a position to prevent the commission of the offence. The French law (C. F., 206) makes husbands, fathers, mothers, and guardians responsible for pecuniary damages under *civil* law.

[9] This of course is rare, but some years ago cases did occur on the Salween in British Burma, in connection with a curious case in which a party of adventurers went into the forests beyond British territory and forcibly supermarked a quantity of timber, and afterwards with armed force rescued this from its original and proper owners, when they tried to get hold of it on its floating down the river to a timber station.

§ 2.—*Enhanced Punishment on Second Conviction.*

In the Penal Code however (and consequently a grave forest offence of the kind punished under that Code might fall within the rule) provision is made by section 75, that any person who has been convicted of any offence under Chapter XII (Offences relating to Coin and Stamps) or Chapter XVII, Offences against Property (theft, robbery, breach of trust, receiving of stolen property, cheating, mischief, criminal trespass, &c.), the said offence being punishable with imprisonment of three years or upwards, and is again convicted of *any* offence punishable under these chapters, which is of the same magnitude as regards punishment, he may be transported for life, or receive double the amount of punishment otherwise awardable (up to a limit of ten years in the case of imprisonment)[10]. The Whipping Act also provides that flogging may be *added* to other punishment in certain cases of second conviction (of the *same* offence however).

[10] The Bavarian Forest Law of 1852 (Art. 58) admits of aggravating circumstances, and gives a very instructive list. And I may advise the Forest Officer in India to study them, because it must be remembered that although our law does not recognize aggravating circumstances as raising the *maximum punishment provided by law*, except in the specific instances stated in the text, yet there is always a wide discretion left to the Magistrate trying the case, whether he will award the maximum sentence or one much less. Hence "aggravating circumstances," such as in the nature of things may be adduced in evidence to establish the greater criminality of the offence and so affect the amount of sentence, should be proved in criminal trials when they exist, independently of any special effect to be produced by them in certain cases only.

The Bavarian Law enumerates the aggravating circumstances thus :—

(*a*) Offence during the night (before sunrise or after sunset).

(*b*) On Sunday or legal holiday; because then the absence of the means of prevention or detection in the Act is more to be counted on.

(*c*) Offender provided with devices to prevent his recognition (*e.g.*, thief with crape over his face, &c.).

(*d*) Offender armed with fire-arms.

(*e*) Cases where the cutting or removal of forest produce is effected by means which exaggerate the damage.

Example.—Hacking a branch or a stem with an axe instead of a saw; not only cutting the stem but grubbing out the roots, so that the tree cannot coppice.

(*f*) The offender runs away after being called on to stand and give himself up.

(*g*) Refuses his name and residence or giving false one.

SECTION III.—LIMITATION AS REGARDS TIME OF PROSECUTION.

Lastly, I may mention that our criminal law does not recognize any period of limitation as doing away with an offence or preventing its prosecution.

In theory there is no reason why such a limit should be set and although it would be absurd that a petty offence should be raked up against a man after many months or years, practically such a thing never happens: the proof of a small offence would be sure to disappear, and the Magistrate would also have excellent ground to refuse a summons; it is therefore judged better to leave the subject entirely alone, except in some special

(*h*) Taking away objects which have been lawfully seized or sequestrated. (This would be a special offence by itself in India; not a circumstance subordinate to another act.)

(*i*) Offender has continued the offence after being warned against it.

(*j*) The offender is a right-holder, or a forest-laborer, or employed as a wood-cutter in the forest.

(If he was actually a public servant or Forest Officer, and committed an offence, of course there would be a special and exemplary penalty: here the offender is not actually a Forest Officer, but is in such a position as to make it an aggravating circumstance if he is concerned in an offence.)

(*k*) If the theft of wood or other produce involved the cutting out or removal of some property-mark already on the material.

(*l*) When the offence is committed within a year of a previous conviction for the same (or a greater) offence.

(*m*) When there was an intention of doing injury to the forest growth beyond the mere act of appropriation of the particular wood or produce stolen.

(This intent may be presumed when the wood cut or produce removed is useless to the offender, or is in such quantity or of such a kind that a person in his station of life could not be under any temptation to take it for its own sake.)

The French Forest Law (Code F., Art. 201) recognizes as aggravating circumstances—

(*a*) "Récidive," *i.e.*, a second conviction for any *délict* or contravention against the Forest law, within 12 months of a previous conviction.

(*b*) When the offence was by night; or when a tree has been *sawn* down. (*Usage de la scie pour couper les arbres à pied.*)

The penalty is doubled in these cases.

(The use of the saw makes no noise, hence it is an offence concealed; also the use of the saw in a coppice wood may be detrimental to the reproduction.)

cases where prosecutions are expressly required to be instituted within a certain period[1].

SECTION IV.—GENERAL REMARKS ON PROSECUTIONS.

It is, perhaps, necessary as a warning to say that in all graver matters of criminal law, the Forest Officer should seek legal advice, because no teaching from a Manual can supply all the details, or indicate all the exceptions, which an experienced lawyer knows how to apply under any given circumstances.

Generally, it must be observed that the prosecutor must be prepared to make out *affirmatively* the charge he makes: he cannot make a charge and say, "I cannot prove it very well; but you defend yourself, and if your defence is not complete that will show you are guilty." It is only when an *offence* is *primâ facie* brought home, that the accused must clear himself or be convicted. For example, a man's house near a river is found roofed with water-worn sleepers. It is of course possible, if not likely, that he has misappropriated them, because, it can be shown that it would not have paid him to employ sleepers that he had *bought*, for such a purpose. But the prosecution cannot simply charge the man, and say "I will stand by while *you* prove how you got the sleepers." It should establish first such a strong case, that the sleepers could not have been bought and must have been taken from stranded pieces washed up on shore, that the burden of proof to the contrary is laid on the accused.

Whenever an exception is stated in the section itself, under which a person is charged, the prosecution should be prepared to make

[1] Instances are under the Excise Act, the Arms Act, Police Act, the Copyright Act, and the Act for protecting wild elephants (VI of 1879). The French and some German laws are different. The Bavarian Forest Law (Art. 71) requires forest offences to be prosecuted within one year from the day of perpetration.

The French Code For. (Art. 185-187) (with some exceptions) fixes three months as the limit, if the *procès verbal* specifies the delinquent and six months if it does not; the "prescription" runs from the date on which the offence was formally recorded *constaté*). If there has been no *procèe verbal* at all, the case is held to come under the ordinary criminal law, which gives one year or three, according to the gravity of the offence.

out the *absence* of the exceptional circumstances, when such absence is necessary to the very existence of the offence, but not otherwise. If the exception is a general one of law, then the accused must plead it. Thus, the prosecution need not prove that the offender was of sound mind, of full age, &c., for if the accused raises that as a defence *he* must allege and prove it.

APPENDIX.

Note on the Civil Law of Trespass.

An offence of trespass in a forest will in most cases be amply provided for by the punishment *and* award of compensation under section 25 of the Forest Act. There may, however, be exceptional cases in which the civil law of trespass may come into play.

The subject belongs to that branch of law called the Law of Torts, or the law under which remedies are provided by the Civil Court for wrongs to the individual, which are not crimes under the criminal law. It is true that some acts which the criminal law punishes, may involve also a tort or wrong for which the Civil Court will award damages, but a simple tort does not involve a crime[2].

It has been stated that when an act constitutes a crime (unless it is one that the law allows to be compounded, *i.e.*, allows the individual injured to accept satisfaction without insisting on the case going on in the interests of public justice) the right of civil action is *suspended* till the offence has been prosecuted criminally: but the High Court of Bengal has decided that this rule (even with the limitations it is understood to bear in England) has no application in India[3].

[2] For example, an "assault," or the "use of criminal force," or "causing hurt" is a criminal offence, because, though in any given case it is an individual person that is injured, still if such acts of violence were not repressed by the public authority, they would become general, and a sense of public insecurity to person and ultimately to life, would be spread abroad. But such an offence gives rise also to a civil action: and although the Magistrate had dealt with the case, the injured person might proceed with a separate civil action for damages.

[3] See Mayne's Penal Code, 9th edition, page 188.

A trespass is not punishable under the Indian Penal Code unless there is an *intention* to commit an "offence" (which includes any offence under a special law, if punishable with imprisonment for six months or more with or without fine)[4]. Not so at civil law; *any* entry on the land in the occupation or possession of another constitutes a trespass for which an action for damages is maintainable, unless the act can be justified. This is a very necessary principle, since if it were not so, trespasses might be committed and afterwards pleaded as acts of adverse possession, although nothing had been done but simply entering on the premises.

"If," says Addison[5], "a man's land is not surrounded by any actual fence, the law encircles it with an imaginary enclosure, to pass which is to break or enter his close. The mere act of breaking through this imaginary boundary constitutes a cause of action as being a violation of the right of property, although no actual damage may be done. If the entry is made after notice or warning not to trespass, or is a wilful or impertinent intrusion on a man's privacy, or an insulting invasion of his proprietary rights, a very serious cause of action will arise, and exemplary damages will be recoverable: but if there has been no insulting or wilful and persevering trespass, and no actual damage has been done, and no question of title is involved, the damages recoverable may be merely nominal.

"Every trespass upon land is, in legal parlance, an injury to the land, although it consists merely in the act of walking over it, and no damage is done to the soil or grass."

If, therefore, simple trespass, as a menace to proprietary right, is actionable, so also is every act of damage, whether it is cutting grass or trees, removing stones or discharging rubbish on the ground, or letting out water on to the land. And even if the wrong-doer has

[4] A trespass in a *reserved* forest is specially made an offence under section 25 of the Act, without any reference to intention; but that is a special case and enacted for special reasons.

[5] Law of Torts (Caves' 5th edition), page 330.

caused the damage unintentionally, he is still liable if damage actually occurs, unless the damage was beyond his control and he could not help it.

In any case of course the damages may be merely nominal; but it is a well-known principle of civil law that wherever there is an actual wrong, as such, there must be a remedy.

The question of actual value of damage done, is often one of difficulty. Take, for instance, the case of a forest which, like so many in Burma, consists of a jungle of bamboos with teak scattered about it. As long as those teak trees stand, their seed may fall, and greatly increase the number of valuable trees in the forest, especially under proper management in keeping out fire and cutting the undergrowth so as to encourage the teak. Here, if a man unlawfully cuts out a large proportion of the teak, he not only deprives the Government of the value of the timber but also the reproductive power of the tree. It is somewhat analogous to the case of a wrong-doer who should kill a valuable bull kept for breeding purposes: it would be poor compensation to give him the value of the carcase as beef; what he values is the reproductive power which may give a progeny of valuable animals.

The question of damages, however, is governed by principles similar to those which prevail under the Contract Law. The damage must be the direct consequence of the wrong, and "remote" or indirectly resulting damages will not be allowed. What is remote or indirect damage, is a question of fact under the circumstances.

In cases in which the wrong-doer has removed the material, the rule is that the presumption is against the wrong-doer; where a teak tree is cut and removed, if the timber is not forthcoming, it will legally be presumed that the stem was sound and well grown. This follows the well-known leading case, where a jeweller had fraudulently removed a gem from its setting, the latter being produced, and evidence of the nature of the gem forthcoming, the jury was directed to assume that the gem of that size was of the first quality and purest water—"*omnia presumuntur contra spoliatorem.*" A forest instance

of this may be cited from the French law, which draws a distinction between the offences of cutting a tree above two decimetres in girth, and cutting one below that size. The girth for the purposes of this distinction is taken at one metre above the ground (Arts. 192-3, Code For.). If the wrong-doer has removed the stem, the measurement of course cannot be taken at one metre, so the measurement is taken at the top of the stool which remains, although this is likely to be unfavourable. But this is on the principle of the presumption against the wrong-doer.

CHAPTER XVII.

THE LEGAL PRINCIPLES OF PUNISHMENT.

§ 1.—*Kind of Punishment allowed.*

In the course of considering the offences which may be committed in connection with forests and their produce in transit, allusion has been made to sentences of fine and imprisonment; it is therefore necessary to study shortly the questions which any intelligent person will at once perceive to arise on the subject of legal punishment. The nature and amount of punishment, whether under the Indian Penal Code or under the Forest Act, must be learned from the Indian Penal Code.

The Forest Act speaks merely of "fine" and "imprisonment"[1]; but the rules of the general criminal law applicable to these punishments are to be gathered from the Indian Penal Code, Chapter III[2].

The only punishments known to the law are (Indian Penal Code, Section 3):—

(1) Death.

(2) Transportation (penal servitude in the case of Europeans or Americans). (Section 56.)

[1] The student will remember that in all Acts passed after Act I of 1868 (General Clauses Act), the word "imprisonment" by itself means *either* "rigorous" or "simple," as defined in the Penal Code. Of course the Penal Code itself never uses the word except with the qualifying epithet—rigorous (*i.e.*, with hard labour) or simple (without hard labour), unless imprisonment generally—of any kind—is obviously indicated by the context.

[2] It was not, at first, stated in the Code itself that this chapter applied to the infliction of punishments under special laws: and in so far as it deals with sentences of death, transportation, penal forfeiture of property on conviction, and fine, the limit of which is not stated (*e.g.*, sections 54—63), its provisions do not practically come into play; but sections 64, 65, 66, 67, 68, 69 and 70 have been declared by Act I, 1868 (General Clauses Act) to apply to fines and sentences of imprisonment in default, &c., under the Forest and other special laws, unless there is an express provision to the contrary. And the recent Act VIII of 1882 amending the Penal Code, further provides that, in sections 64, 65, 66 and 71, the term "offence" means any offence whether under the Code or any other law.

(3) Forfeiture of property (in cases where there is a death sentence or one of transportation).

(4) Imprisonment (simple or rigorous).

(5) Fine.

To these Act VI of 1864 has added (6) *Whipping*, in certain cases.

The Forest Act also provides (7) Confiscation[3] of property and implements in connection with a forest offence, which constitutes a special form of penalty peculiar to forest cases, and of course has no connection whatever with the forfeiture (above mentioned) of all property, or forfeiture of rents and profits for a time, contemplated in certain grievous cases, as accompanying a sentence of death or transportation.

With the first three of these forms of punishment, applicable only in heinous cases, it is not practically necessary that the Forest Officer should concern himself.

I may also here, though out of its order, dispose of the additional punishment of *whipping* (Act VI of 1864). This cannot be inflicted for any offence *prosecuted under the Forest Act* at all, not even to juvenile offenders, who by the Whipping Act can be punished with whipping ("inflicted by way of school discipline") for any offence (not punishable with death) *under the Penal Code*[4].

In cases of forest crime punished under the Penal Code, whipping could be inflicted as an *alternative* to other punishment, in the cases specified in the Act; and as an *additional* punishment, in case of second conviction of the offences mentioned in section 4 of the Act (but it must be the "same" offence).

[3] I ought perhaps to add as a form of punishment that in cases of forest fire, the *suspension* of forest *rights* may be ordered (section 25, Forest Act, last clause).

"*Compensation*" (the *dommages interêts* of French law) may also be awarded as well as fine by the sentence of a Magistrate in Forest cases, under section 25.

[4] And the Forest Act contains no express provision. Some Acts do, for instance for certain offences in Cantonments (Act XXVI of 1870), under the Criminal Tribes Act (XXVII of 1871), &c.

§ 2.—*The Procedure for inflicting Punishment is a separate matter.*

The student will bear in mind that while the substantive law deals with the nature and amount of punishment, and the cases in which each kind is appropriate, the Adjective or Procedure law also has to go into some further matters connected with the *mode* of inflicting the punishment, the place of imprisonment, the mode of levying fines, the instrument with which whipping is to be administered, and so forth.

§ 3.—*Cumulative Punishment.*

I should also here make an allusion to the case noted in section 71, Indian Penal Code, which is applicable to all offences (made so by the amending Act VIII of 1882).

Where anything is an offence which is made up of parts, and any of the parts is by itself an offence, the offender cannot (in the absence of an express provision to the contrary) be punished with "the punishment of more than one of such offences." The illustration in the Code is that of A beating Z with fifty strokes of a stick. The whole beating constitutes an offence, *viz.*, of "voluntarily causing hurt"—but each blow is also an offence: nevertheless, under the restriction of this section, A could not get fifty punishments, but only one punishment, for the whole beating. A forest illustration would be the case of a man cutting down fifty trees illegally; here he would be punished for one whole offence, being probably charged with a gross offence under the Mischief section of the Penal Code (not merely for a forest offence); but in any case he could not get fifty sentences, one for each tree.

It is also provided[5] that if a person commits an act which is a double offence, that is, falls within two or more separate definitions of an offence, he cannot get a *separate* punishment consequent on each definition and the offence thereby arising; he can only get

[5] Formerly this was contained in the old (1872-74) Criminal Procedure Code section 454, clause II; it is now properly added to section 71, Indian Penal Code, by the amending Act VIII of 1882. It is not a procedure matter. The procedure rules about charging, when the same acts come within the definition of more than one offence, may be seen in section 235 of the (new) Criminal Procedure Code.

one, which may be the severest he would be liable to according to either definition.

At the same time the *charge* may *specify* all the separate offences, but the sentence can only be the maximum for any one offence, or for the offence resulting (if a separate one[6]) from their combination.

SECTION I.—OF IMPRISONMENT AND FINE.

§ 1.—*Penalties under the Forest Acts.*

The punishments awardable under the Forest Act are imprisonment and fine. It will be desirable therefore to describe them more in detail. As regards the amount of penalty. In section 25, Indian Act, the same maximum amount is by law provided; leaving it to the Magistrate to order an appropriate imprisonment and fine within the limit. But for offences under rules made under section 32 (protected forests), section 41 (timber transit), 51 (salving), the rules themselves are to indicate the amount of penalty. I am not aware that there is any benefit in the distinction. The Burma Act is the same; except that in reserved forests the offences are classified into two sets; the less important are punished with fine only, extending to 50 rupees (or double that if the damage done exceeds 25 rupees), the graver (section 26) are punished as in the Indian Act, with either fine or imprisonment or both.

§ 2.—*Imprisonment.*

Imprisonment, as I have already stated, may be either rigorous (with hard labour) or simple (without), and in the Forest Act and all other Acts passed since the beginning of 1868, the term "imprisonment" would by itself mean (as explained by the General Clauses Act)[7] imprisonment of either description.

[6] In the case put, the cutting of 50 trees, the combined offence is not a separate one from the offence of cutting one tree.

Take, on the other hand, the case of intentionally destroying 50 young trees by fire; each tree might only be worth Rs. 5 say, so that the separate offences of mischief, if charged under the Penal Code, would only come under section 426, but the combined offences would bring the value up to Rs. 250, and so the more severe punishment under section 436 would be awardable.

[7] Act I of 1868, section 1, para. 18.

"Solitary confinement" is a form of imprisonment regulated by section 73, Indian Penal Code. It cannot be awarded in any sentence under the Forest Act[8], but can of course be ordered, if the trial has been under the Indian Penal Code and the sentence is one of *rigorous* imprisonment. The rules about solitary confinement, and the limit of it, are contained in sections 73 and 74, Indian Penal Code; but it is not necessary for the forest student to enter into further detail.

§ 3.—*Fine.*

In the case of offences under the Indian Penal Code, or those under section 62 of the Forest Act, where "fine" is mentioned without specifying any limit, it is understood that there is no artificial or legal limit, but that the fine must not be "excessive," *i.e.*, with reference to the means, position, or circumstances of the offender. This is provided by the Indian Penal Code, section 63.

Under the Forest Act, fine is limited to Rs. 500; but besides this, and as part of the sentence, such compensation for damage done to the forest as the convicting Court may award can be ordered to be paid. This only refers to cases against a reserved forest estate (section 25), not to cases in protected areas (section 32), although the penalty is otherwise the same. The Burma Act is the same.

Under section 42 (B. section 44) the general limits of punishment for breach of rules regarding timber transit are the same: but, as already explained, the section admits of aggravating circumstances which may double the penalty. Offences against rules under section 51 (Ind. and B. Acts) have also the same general limit of penalty.

Residuary rules not specially provided for, have naturally a narrower limit of penalty (one month's imprisonment and 500 rupees fine or both) under section 76. In Burma it was not thought

[8] Because section 73 refers only to an offence under the Indian Penal Code, not to offences under special law.

necessary to provide these. There are no *such* subsidiary rules under the Act as would require a penalty.

§ 4.—*Imprisonment in default of Fine.*

In all cases of fine (whether under Forest Act or Penal Code) a term of imprisonment may be (and always should be, except in very trivial cases of fine) awarded, to take effect *in default of payment.* (Indian Penal Code, section 64, as amended by Act VIII of 1882.)

When fine has been imposed along with imprisonment, or has been imposed alone, although imprisonment might have been added as part of the principal sentence, the order of imprisonment in default of fine may always be in addition to the original sentence of imprisonment (if any). The term imposed in default, in such cases cannot exceed *one-fourth* of the maximum term of imprisonment provided for the offence (section 65, Indian Penal Code), nor, as a matter of procedure, can any Court impose a sentence in default of fine, exceeding *its own power* of imprisonment or *one-fourth* of that power, in cases where a substantive sentence of imprisonment has been awarded as well as fine. (Criminal Procedure Code, section 33.)

If the offence is punishable with fine only, the alternative imprisonment must be regulated by section 67, Indian Penal Code, *i.e.*, not exceeding two months where fine does not exceed Rs. 50, or four months where it does not exceed Rs. 100, or six months in any other case, and is *simple.*

Imprisonment in default, whatever it may be, of course terminates directly the fine is paid or recovered (section 68), and if a part of the fine is paid or recovered, a proportional part of the imprisonment in default is remitted. (Section 69.)

§ 5.—*Recovery of Fines.*

The method of levying and recovering fines is a matter of *procedure* (see Chapter on Criminal Procedure); but as regards the period within which a fine, so to speak, remains in force, and is liable to be recovered, the Indian Penal Code provides that it can be levied at any time within six years from date of sentence, or should the prisoner beunder sentence of imprisonment for more than six

years, up to the termination of his sentence. The death of the offender does not discharge the fine, but any property legally liable for his debts is liable also for his fine[9]. (Section 70.)

SECTION II.—CONFISCATION AS A PUNISHMENT UNDER FOREST LAW.

§ 1.—*Two Subjects included.*

The Forest law has made a necessary addition to the ordinary list of criminal penalties under the head of *confiscation*[10].

In the Forest Act this subject is dealt with in sections 52-60. (B. *id.*)

In the section alluded to, not only is *confiscation* as a penalty, and properly so called, included, *but also the case* where property connected with a forest case, probably obtained by the commission of an offence, is either produced at the trial along with the offender, or is discovered lying in the forest, the actual offender who cut or prepared it for removal not being known or arrested.

It is obvious that in these latter cases there is nothing in the nature of *confiscation* properly so called. The property never belonged to the wrong-doer in whose hands it was seized, nor to the person (whoever he may be) who cut it and left it lying.

§ 2.—*Procedure.*

As the procedure is the same, or at all events is analogous, in both cases, the whole subject is dealt with in the Forest Acts in the same chapter.

Where any forest produce appears to have been the subject of an offence punishable under the Forest Act, the first thing to be done is to make a formal "seizure," which may (section 52) be effected by any Forest or Police Officer. The fact of seizure is indicated by putting *a mark* (section 53, usually the "broad arrow") and a report has at once to be made to the Magistrate who would have jurisdiction to try the offence.

[9] But it may be a question whether the *procedure* of *recovery* by distraint and sale can be applied after death.

[10] The French law is similar. Seizure may be made of all cattle, tools, carts, &c., "*trouvés en délit*" (C. F., 161), and all illicitly obtained produce may be ordered to be restored (*restitué*), for there is no real confiscation in such cases (C. F., 198): tools of all kinds can be confiscated, but not animals nor carts.

If there is an offender connected with the case, and he is not arrested on the spot, the Magistrate will take the necessary steps for his arrest and trial. At the close of the trial, if the property appears to be Government property, the Magistrate will order its restoration, and the Forest Officer will take charge (section 55), or he may order any other disposal that he thinks right[1]; and if the property belonged to the offender, the Magistrate may order its confiscation, in addition to any other penalty, under section 54. If there is no offender, or none can be found, the Magistrate enquires into the cause of seizure, and if he finds that the property has been obtained by the commission of a forest offence, he can order its restoration, or order its delivery to any person he deems entitled to it[2].

But it will often happen that though the actual offender is not traced[3] some person is known or believed to be concerned with or interested in the produce seized, then notice should be issued to

[1] So also under the Criminal Procedure Code, section 517. Here also, it is not necessary that the accused should be convicted. As long as *any* offence appears *to have been* committed with regard to the property produced, the court may pass orders for its disposal. The section only speaks of property produced before the Court. And the property need not be in the original state in which it was before the offence; the property dealt with may be the result of melting up, fashioning or altering the original.

The procedure in section 51 of the forest law and section 523 of the Criminal Procedure Code are very similar. But there are so many peculiarities in forest cases, that it is better to provide specifically for the subject in the Forest Act.

[2] In these cases, of course, it is difficult to say who it belongs to, because there is appearance of an offence but none as yet proved. The Forest Act, therefore, facilitates the enquiry by laying down that where wood is seized in this way, the Court shall start with a presumption that the wood belongs to Government: then any one else who (as will afterwards be stated) was found to object to this seizure is properly put to prove his title against that *primâ facie* presumption. (Act, section 68, B. 67.)

[3] In the Burma timber frauds in 1872 large quantities of teak logs were found in the forests, obtained fraudulently under colour of a permit or lease to cut certain teak trees. No one was put in charge, nor could it in all cases be ascertained who actually cut them. But it is believed or known that a Company, the holder of the permits, was interested in the timber; consequently, a notice was issued to them on the seizure of the timber, to show cause why it should not be made over to the Government officers. In those days the Act of 1865 was in force, under which all such proceedings were spoken of as "confiscation." It is obvious, however, that in such a case there was no confiscation, as the property was in fact stolen from Government and never was lawfully the property of the Company at all.

such person, or a general public notice issued and one month's delay allowed, during which any person may be heard and may offer evidence against the seizure: no order is passed till the month has expired (section 56).

If the property is such that will not keep or will deteriorate, it may be sold by the Magistrate's order, and the money proceeds will be kept or dealt with in the same way as the property itself. (Section 57.)

§ 3.—*Distinction explained.*

It is hoped that the student will have fully mastered the distinction between sections 54, 55, 56.

In actual practice, cases of *confiscation* are not common, for the property must be that of the wrong-doer, only that some offence has been committed in respect of it: for example, he has lawfully obtained 300 poles of teak, but he has smuggled them by a forbidden route, to evade the pass regulations: here the *property* is the offender's, lawfully enough; if therefore the property is taken from him as a penalty for the smuggling, that is *confiscation*, properly so called; so if his cart, axes, or cattle were taken, as used in committing the offence; but it is to these cases *only* that section 54 applies. Far more commonly, what happens is this, that a person commits an offence, and he is caught, and with him a large quantity of wood, &c., *wrongfully* cut or removed; here, at the close of the trial (section 55), the Magistrate will simply *order* the stuff to be given back to the Forest Officer; there is no *confiscation*, because the wood never was the property of the offender at all. It is the same with section 56; the Forest Officer may come across a lot of Government timber lying in the forest, but the offender has heard of his approach, and has left it and fled: here of course he must get a Magistrate's order to dispose of the property, although no offender is caught; but it is no *confiscation*, only a restoration of the property to Government, from whose possession it was wrongfully removed.

§ 4.—*Mixture of Property.*

A very common case is where, when the property is seized, it is found to be a mixture. For example, a man has a 'permit' to collect dry and fallen wood, and to stack it for removal; he nefariously cuts a lot of green wood, and mixes the billets with the dry in the stacks: here, as a forest offence has been committed in respect of some of the wood, it can be seized: the Forest Officer would be justified in at once separating the green from the dry and seizing the green; or, if he could not make the separation, he might fairly seize the whole[4].

But it will be clear that in regard to such stacks no order of *confiscation* is passed. Section 54 does not apply; section 55 does. The trial being over, the Magistrate would simply pass an order that the green wood was to be restored to Government, and the dry given back to the accused.

The dry wood could not be *confiscated*, it will be observed, for no offence has been committed in respect of *it*. It was lawfully enough obtained, and never would have been seized at all, but that it was mixed with other stuff that *was* liable to seizure, and it was at once separated (unless such separation proved impracticable). The green wood would also not be the subject of *confiscation*, for it has never become the property of the thief, and can only be *restored* to Government. In such cases the only order that can be legally passed would be at the close of the trial (1) to separate the material, restoring each kind to each person, (2) to sell the whole and allot a fair value out of the proceeds to the parties[5].

[4] No doubt it will be convenient that the Act should be amended so as to specify this case; but I think even now, on general principles of justice, the Courts would so decide. If, a thief, by his own wrongful act, so mixes up what is his own with what is stolen, he certainly could not complain if the whole were seized, and even in the end the Magistrate would be justified in restoring the whole lot to the forest officer, unless the prisoner could prove what was his, and there was some special equitable way of adjusting the respective value of the part that was not stolen, as, for example, if the stolen wood were only a very small part of the entire heap.

[5] And naturally, the value of the wood restored to prisoner could be attached by the Court in liquidation of any fine or compensation ordered to be paid.

§ 5.—*Appeal.*

From any order of disposal after trial, or disposal where no offender has been found, there is an appeal, either on the part of the Forest Department, or of the offender, or person interested in the property seized (section 58). One month is allowed for the appeal.

In the case of confiscated property after the appeal has been heard, or after the period of appeal has elapsed, the confiscated property vests absolutely and free of incumbrances in the Government (section 59).

§ 6.—*Release of Property seized.*

Under section 60, the Local Government may empower any officer to direct the immediate release of property seized. This will enable errors to be corrected at once without putting the person interested to the trouble and expense of a trial or appeal[6].

This power, coupled with the liability of Police and Forest Officers to be prosecuted for "vexatious or unnecessary" seizures are ample safeguards against any abuse of the powers given by this Chapter, which otherwise are obviously necessary for the safety of Government and other forest property.

[6] In the North-Western Provinces, Government has empowered all Conservators and Deputy Conservators to exercise this power; but this was hardly intended, for it is obvious that if a subordinate made a seizure, and his official superiors thought the seizure unnecessary or undesirable, they could order its release and refuse to proceed, in the ordinary course of their official duty as controlling officers without any special power. What is meant is that the Commissioner or other such superior Civil or police authority should be vested with power to summarily interfere and stop the proceedings if he thought the seizure unwarrantable.

It is in connection with these proceedings that under section 32, a Police Officer or Forest Officer is threatened with punishment for a vexatious or altogether unnecessary seizure.

CHAPTER XVIII.

CRIMINAL PROCEDURE[1].

§ 1.—*The Subject stated.*

The treatment which this subject will receive is necessarily fragmentary. I must confine myself to those portions of the subject which directly come under the notice of a Forest Officer in the course of his official duty, and those subjects are mainly, how offenders are arrested, how police investigations and the subsequent trial of offenders are conducted, how sentences are carried out and fines recovered, and what appeals are allowed. A few minor points, such as the special rules for trial of European British subjects, the practice in the execution of search warrants, and the rules for recording evidence in criminal cases, will also need a brief notice.

As, however, the Criminal Procedure Code itself contains much more than this, and some of the other subjects *may* from time to time engage a Forest Officer's attention, he may at least desire to know *where to find information* on some of the other topics of criminal procedure. I shall, therefore, devote a few paragraphs to presenting a general idea of the contents of the Criminal Procedure Code, as in force in British India, as a whole.

§ 2.—*The Plan of Criminal Procedure Law.*

The law in force is Act X of 1882[2].

[1] It is possible that this book may be published a month or two before the Code actually comes into force, which is from the 1st January 1883. Up to that time the old Code (Act X of 1872, amended by Act XI of 1874) will still be used: but the new Code differs very little *in principle*, from the old. The new Code is mainly distinguished by the fact, that while in the old Code all subjects followed one another without order and logical arrangement, the order is now consecutive and logical. There are of course alterations in detail, and many previous difficulties have been removed.

[2] Throughout this chapter, I expect the student to refer to the Code itself: the chapter, I desire to make it clear, is only a *Guide* to the Code. The words of the section must be referred to wherever action is to be taken. It is essential to see that a copy of the Code is obtained which gives the amended form of the law.

The "Substantive" criminal law is that which constitutes certain acts to be offences, and prescribes penalties for them. The centre of this law is the Indian Penal Code, but it is supplemented by various "special laws," dealing with particular subjects, for example, Forests, Excise, Opium, Customs, Stamps, under which acts or omissions contravening the law also become offences. The substantive law also lays down the general nature and limits of the punishments which may be inflicted, and this we have already considered. The "Adjective" or Procedure law is a necessary complement to the substantive, since it has to tell us which are the Courts which can try offences, how these Courts are to proceed in investigating and trying cases, and what is the method of executing sentences; there are also many subjects, such as the prevention of crime and other exercises of Police and magisterial powers which have to be provided for. I will then first present the reader with a skeleton or outline of the contents of our Criminal Procedure law.

§ 3.—*General Outline of Procedure Law.*

First, of course (after preliminary matter and definition of terms), comes the *constitution of the different Criminal Courts* according to their grade or class.

Parts I and II.
Chapter III.

Next, the *powers* of these Courts have to be specified, the *description of offences* each may try and the *amount of punishment* each is competent to inflict.

Part III.
Chapter IV.

The authorities thus constituted, the first subject in natural order is the acquisition of *information* that *offences* have been *committed:* and the duty of the public, or of certain classes, in giving information and aid to the Magistracy or to the Police, is accordingly laid down.

Chapters V, VI, VII.

As in the discovery and prosecution of all offences, the production of property connected with the case, and the getting hold of the persons required either to answer for offences, or to give evidence,

is necessary, the general provisions relating to the execution of *warrants* of arrest, of the *arrest* of persons in certain cases *without warrant*, of *summons* and their service, and of warrants to *search*, are next set out.

Part IV.

But before proceeding to the investigation and trial of cases, it is obvious that much may be done for the *prevention of offences*: and provisions regarding this subject logically come before provisions relating to the discovery and trial of offences actually committed. The subjects which come under the head of prevention will recur familiarly to the reader directly they are mentioned.

Chapter VIII, *A. B.*

Security may be taken, for example, from persons whose enmity may cause a *breach of the peace* to be likely. Suspicious characters, who are of notoriously *bad livelihood*, or have no ostensible means of living, are likely to be concerned in offences, and therefore may be called on to give *security for good behaviour*.

Chapter IX.

Again, when persons assemble in groups (the law fixes five as the minimum number which warrants interference) for some bad purpose, it is time for the Magistrate to interfere under provisions directed to the *dispersion* of *unlawful assemblies*.

Chapters X, XI.

Nuisances (of the kinds specified by law) may be removed also by order of Magistrate, and thus calamities of different kinds obviated.

Chapter XII.

Obstructions to public roads, &c., may similarly be removed by order. These are obviously preventive provisions. So again in *disputes* about land and houses. The feelings of rival claimants often run so high in these matters that rioting and even bloodshed may be apprehended. The law thus arms the Magistrate with power, summarily to maintain the person in actual possession in the position he occupies *de facto*, and so compel the opposite side to resort to legal and peaceable means of getting the question of right settled[3].

[3] See *ante*, Chapter I, page 19.

Chapter XIII.

The *Police* also may do many things towards the prevention of offences.

Part V.
Chapter XIV.

Having thus disposed of the subject of prevention, the law proceeds to describe how offences may be discovered and their perpetrators brought to justice. In grave cases, the Police force is set in motion by complaint or information; and the proper officers are armed with powers to investigate, and to arrest suspected persons, thus finding out the case, getting together evidence, working up the proof, and then submitting it for disposal to the Criminal Courts.

Detailed provisions enabling the Police to act in this way are enacted; and along with them certain further provisions necessary to protect the public from any abuse of authority in the exercise of such powers.

With the lesser classes of offences the Police are not empowered to deal without an express order of the Magistrate: and in these the injured parties have to submit their *complaints* direct to the *Magistrate*, who will then proceed to issue his process to compel the appearance of the wrong-doer.

Part VI.

Thus, whether the case has come before the Magistrate through the agency of the Police, or by means of a complaint directly preferred to him, we have now the case actually ready for the *trial* of the *offender*.

Chapters XV—XVII.

To this subject there are several preliminary points. It has to be determined at what *place* trials are to be held, in what manner cases are to be brought under the cognizance of the different Courts, *what* Magistrates may receive complaints, how cases are to be brought to trial before Sessions or High Courts, and so forth. In some cases special sanction is required (as we have seen) before a Court can enter on the prosecution at all. Then we come to the actual procedure according to the class of cases and the Court before which it is tried.

The order of proceeding is laid down for each different form of trial—the *committal* of cases by a Magistrate for *trial* by the High Court or the *Sessions* Court, the *trial* of cases *before Magistrates*, and the *summary* procedure which may be adopted in certain cases.

Chapters XVIII—XXII.

Under the head of trials before the High Courts and Sessions Courts, which are tried with the aid of Juries or Assessors (as the case may be), provisions are made regarding the selection of Jurymen and Assessors, their duty and so forth.

Chapter XXIII.

Next follow provisions regarding various incidents of trials, such as the *tender of pardon to an accomplice*, so that he may be used as a witness, or what is popularly called "Queen's Evidence;" the power of *compounding offences* and so stopping the trial, and certain other matters. A special chapter is also devoted to the work of *recording evidence* on trials, and recording *statements* or confessions made by *accused persons*.

Chapters XXIV, XXV.

Then follow provisions regarding *judgments, confirmation of sentence* in certain cases, and the *execution of sentences* and *recovery of fines*, together with rules regarding the suspension or *commutation of sentences*, and the effects of previous acquittal or conviction.

Chapters XXVI—XXX.

This brings the subject of original *trials* to a close; but the law contemplates an *appeal* in certain cases; moreover, there is a power of *revision* in certain cases whereby the superior Courts may supervise, and correct errors in the practice of the Subordinate Courts.

Part VII.
Chapters XXXI, XXXII.

There are still a number of topics incidental to trials, which require to be dealt with, and some special subjects which are *per se*, but still involve the action of the Criminal authorities, and so belong to the Procedure law.

Part VIII.

Directly connected with trials are the provisions regarding the trial of *Europeans' and Americans*, procedure when the criminal tried turns out to be a *lunatic*, and certain special procedure in *cases* (like contempt of Court) *affecting the administration of justice;* also there are cases in which a Magistrate is asked to make an order to compel the *maintenance of wives and children.*

Chapters XXXIII—XXXVI.

Less directly, but still appreciably, connected with the conduct of trials, are the subjects of the appointment, powers and duties of *Public Prosecutors;* provisions relating to *bail* and *recognizances* of persons released from custody, or required otherwise to appear on certain dates for trial, or to give evidence. It may be desired also to issue *commissions* to examine absent witnesses who cannot conveniently be had personally before the Court, and *special means* are provided for recording evidence of *Chemical Examiners to Government* or *medical witnesses,* whose duties render it impossible for them to attend personally to give their evidence. *Property* also may be produced at trials (as stolen or otherwise) and rules for the disposal of this are necessarily included.

Part IX.
Chapters XXXVIII—XLIII.

It may sometimes be desirable that cases should be *transferred* from one district or place for trial at another: provisions regulating this are enacted. And when there has been some *irregularity* in the various steps and processes above indicated, it is a question to be determined by law how far such *irregularity* vitiates or renders *null and void* the proceedings.

Chapter XLIV.

Chapter XLV.

Lastly, there is a *residuary chapter* for various details, which cannot appropriately find place in the chapters preceding.

Chapter XLVI.

This summary, though it is brief and touches the leading sub-

jects only, gives, I think, a tolerably fair account of the object of our Procedure law.

I will now proceed to fuller detail on those subjects which more or less directly enter into the official duty of Forest Officers. These chiefly relate to the investigation and prosecution of offences of those classes which have been already described in Chapters XIV and XV.

SECTION I.—THE CRIMINAL COURTS.

§ 1.—*The High Courts.*

The highest Courts which have ultimate powers of appeal and supervision (besides in some cases an original jurisdiction, such for example as that in trials of European British subjects on charges of murder, &c.) are variously styled and constituted in different provinces. In Bengal and the North-West Provinces, Bombay and Madras there are "High Courts" (which are constituted under "Letters Patent" by Royal Charter). In the Panjáb there is a "Chief Court" (constituted originally under Act IV of 1866, now under Act XVII of 1877, and not being a Court by Royal Charter)[4]. In Burma there is the Court of the Recorder of Rangoon, which is for certain purposes a High Court[5], and a Judicial Commissioner who superintends all the District Courts and all other criminal matters not specially within the jurisdiction of the Recorder, as the High Court[6].

In the Central Provinces and Oudh there are Judicial Commissioners, and in Ajmer the Chief Commissioner, and these are for the purposes of the Criminal Procedure Code the "High Courts" of the province[7].

[4] In the High Courts the Judges are appointed by the Queen. In the Chief Court of the Panjab by the Governor General in Council.

[5] See Act XVII of 1875, section 61, &c. And he hears as High Court all cases in which European British subjects would have to be tried by a High Court in other provinces. (Section 62.)

[6] Act XVII of 1875, section 35.

[7] In Ajmer the Chief Commissioner does not try European British subjects for those grave offences which are reserved to the highest Court. In this respect

In Assam there is a Judicial Commissioner, but he is like a Commissioner or Sessions Judge, and the Bengal High Court is the "High Court" for the province[8].

Speaking generally, the chief criminal authority, whether called High Court, Chief Court, Judicial Commissioner (or in Ajmer the Chief Commissioner) is under section 4 of the Criminal Procedure Code the "High Court" of the province for the purposes of the Code.

With the details of the working of the High Courts or the procedure in the trials held before them, the Forest Officer need not trouble himself.

§ 2.—*The Courts of Session.*

Next in grade come the *Courts of Session.* In "non-regulation" provinces these are the Courts of Commissioners of Civil divisions, and have jurisdiction over the districts in their division; but there are often Additional Sessions Judges, who share the work and take up cases in certain local limits which are prescribed by Government.

In Regulation provinces there are Sessions Judges, who are separate from the Civil and Revenue Commissioners of Divisions, and there may be Assistant Sessions Judges with restricted powers (described in the Code, sections 9, 31, 194).

Sessions Courts try in their original jurisdiction, those grave cases (such as murder, dacoity, &c.) which are either reserved by law to their special jurisdiction[9] or are of such a serious nature that the powers of a Magistrate are insufficient to deal with them adequately. Sessions Courts never take up these cases either by direct complaint of any person or by the direct report of the Police. (Code section 193.) The same is true of cases before the

these officers have powers somewhat less than those of a High Court (Regulation I of 1877, section 38). This is also the case with the Judicial Commissioners of the Central Provinces and Oudh, and also in Berar. (See C. P. C., section 4 (*e*).)

[8] See Act II of 1835.

[9] As may be shown in the appropriate column of schedule II, at the end of the Procedure Code.

High Court (section 194). Such cases always go first to a Magistrate who holds an *enquiry*. In the course of this he takes down the evidence for the prosecution (not that for the defence, except under particular circumstances), examines (if necessary) the accused, and then draws up a *charge;* and then recording an analysis of the case, and his reasons for concluding that an offence is established, at least *primâ facie*, he *commits* the case to the Sessions; and it is then that the *trial* itself is held, the evidence being recorded, the defence made, the defence witnesses examined, Counsel (if any) heard, and a judgment given, convicting or acquitting the prisoner. These trials are held with the aid of *Assessors*, or in certain places, under the orders of Government, with *Juries*.

Forest Officers so rarely have anything to do with bringing to justice cases of this order, that I shall omit all further mention of the enquiry previous to committal, or the Sessions trial after committal: but chapters describing each are to be found in the Code.

The *Appellate* functions of the Sessions Courts will be mentioned in due order.

§3.—*Courts of Magistrates.—Powers as regards Scale of Punishment.*

The Courts of *Magistrates* are then those which it is important for the Forest Officer to learn the details of.

All Magistrates are classified under the Code into three grades or classes, those of the 1st, 2nd, and 3rd class (section 6).

The first class can sentence up to two years' imprisonment and 1,000 rupees fine (including whipping)[10], 'and solitary confinement'[1] when authorized by law.

The second class can sentence up to six months' imprisonment and 200 rupees fine (with similar powers regarding solitary confinement), and of whipping if authorised by the Local Government (section 32, last clause).

[10] Under Act VI of 1864.

[1] The rules about solitary confinement, and what the limits are, will be given in sections 73-74, I. P. C.

The third class can only sentence up to one month or to 50 rupees fine, and cannot make an order for solitary confinement or for whipping.

A Magistrate may also pass any lawful sentence combining any of the sentences which he is authorised by law to pass: thus, he may (if it is so in the law) award both fine and imprisonment, or imprisonment and whipping, or all three.

Imprisonment in default of fine can be awarded in addition to the term of imprisonment awarded as the primary imprisonment.

In the Panjáb, Oudh, Burma, Central Provinces, and parts of other provinces where there are Deputy Commissioners, &c., the Magistrate of the district may be given, under section 30, "special powers" to try as *Magistrate* all offences not punishable with death, and pass any sentence authorised by law up to seven years' imprisonment, with such fine (not otherwise limited) as may be awarded by law for the offence—whipping, solitary confinement, &c. Sentences of upwards of three years' imprisonment require confirmation by the Sessions Judge, who may confirm, annul, or modify the sentence, or make further enquiry (section 34). This procedure, of course, saves a great deal of work to the Sessions Courts.

§ 4.—*District Magistrates—Sub-divisional Magistrates.*

Besides their powers of inflicting punishment, there are great many other powers which Magistrates require to exercise, such as granting warrants, taking up complaints, taking security, and so forth: all these powers are enumerated in a list contained in Schedules III and IV.

And the principle on which they are conferred is this: All Magistrates (of whatever class) have *ex-officio* certain of these powers (section 36 and schedule III). But then in every district there is the District Officer (Collector or Deputy Commissioner), who is a Magistrate. As such he is called the "District Magistrate," section 36, and he possesses *all* the powers of a Magistrate, *i.e.*, *all* the powers mentioned in Schedule III.

In many districts also portions of the district are placed in charge of an Assistant, and this officer is also a Magistrate. If he is put in criminal charge, he is called a Sub-divisional Magistrate. He may be so appointed by the Local Government or by the District Officer if power to do so have been delegated (section 13). Every Sub-divisional Magistrate has the powers specified in Schedule III as belonging to him. Besides these powers, the Sub-divisional Magistrate, as such, and Magistrates of the 1st, 2nd and 3rd class respectively, may be invested (*a*) by the Local Government and (*b*) by the District Magistrate (subject to the control of the Local Government, section 38) with certain additional powers enumerated in schedule IV.

It should be remarked that originally, as regards jurisdiction with respect to *amount of punishment*, a Sub-divisional Magistrate may be of either the first or second class, but in other respects he has the powers of a 1st class Magistrate (see schedule III), and may be invested with power to call for records under section 435.

§ 5.—*Use of this information to a Forest Officer.*

It is not expected that a Forest Officer will carry in his head the whole of these details, but it may be useful to him to know where to look for information in cases where he has to make any application to a Magistrate. For example, he is likely, on occasion, to have to apply to a Magistrate to *entertain a complaint* of an offence, which is not one which, as a forest offence under the Forest Act, he thinks it necessary for the Police to take up; he may also want to apply for a *search warrant*, or he may want an order to the *Police* to make an *investigation* in cases in which they cannot by law act without such order.

In these cases, it is of no use going to a second-class Magistrate to entertain a complaint unless he has been invested with powers, or is in charge of a sub-division. It is no use asking a third-class Magistrate for an order to the Police to investigate (section 155); he has not, and cannot get, such powers.

A search warrant (section 96) can be granted by any Magistrate.

Shortly, *everything* can be done by a Magistrate of the district, and *most* things by a Sub-divisional Magistrate, the difference being in certain more important and exceptional functions; and in the matter of appeals, Sub-divisional officers being Magistrates of the first class, may be specially empowered to hear appeals from Magistrates of 2nd and 3rd class.

All Magistrates in a district, of whatever grade, are subordinate to the Magistrate of the district (section 17). Magistrates in the sub-division are subordinate to the Sub-divisional Magistrate, subject to the control of the District Magistrate (section 17, paragraph 2).

Magistrates of a sub-division are subordinate to the Sessions Court, only to the extent and for the purposes expressly provided by the Act.

§ 6.—*Jurisdiction of Magistrates with reference to Offences under Penal Code.*

The preceding paragraphs will have explained that the *powers* of Magistrates are limited according to their grade, but that does not completely determine what cases they can try. It is obvious that a Magistrate with powers up to six months' imprisonment will have no jurisdiction to try an offence, the fixed *minimum* punishment for which is say one year. But the majority of offences are punishable with a sentence, the *maximum* of which is stated by the law. A theft, for instance, may be very petty, or may be serious and require three years' imprisonment; nevertheless, all Magistrates can try thefts. In order, therefore, further to discover what class of Magistrate can try what offences, it is necessary to refer (in the case of offences under the Penal Code) to the appropriate section as shown in Schedule II to the Procedure Code.

§ 7.—*Jurisdiction of Magistrate under other Laws.*

And as regards all offences punishable under *special* laws, such as the Forest Act, we must go to section 29 of the same Code, where we learn that in the absence of special provisions, a third-class

Magistrate cannot try when the offence is punishable with imprisonment that may extend to one year, and a second-class Magistrate cannot try an offence when it is punishable with imprisonment which may extend to three years; so that as regards forest offences most of which are not punishable with more than six months with or without fine, *any* Magistrate can try them, though he cannot of course give a sentence in excess of his powers. But the Burma Forest Act expressly provides that third-class Magistrates (see definition clause) are only to try forest offences when specially empowered. In the case of the particular forest offences mentioned in section 62 to the Code, these could not be tried by a third-class Magistrate (because the punishment is in excess of a year), but only by a first or second-class Magistrate.

§ 8.—*Procedure when Jurisdiction appears to fail.*

It is usually known beforehand, either from the preliminary investigation of the Police, or from the examination of the complainant, whether the case is a grave one or a petty one, and so the Magistrate, in distributing cases for trial (section 192) would naturally use his discretion in sending cases to Magistrates not only who have power to try, but whose class is such that *primâ facie* they will be able to deal with them sufficiently. Nevertheless, the law has made a convenient provision (section 349) that if a Magistrate *of the second or third class,* having jurisdiction to try a case, finds that a severer sentence than he can give ought to be passed, he can find the accused guilty, and *record no sentence,* but send his proceedings to the District or Sub-divisional Magistrate to whom he is subordinate, and this Magistrate may, if he thinks right, with or without recalling the witnesses, or making further enquiry, pass such sentence as he thinks fit.

9.—*Procedure when case appears beyond Magistrate's power.*

This latter only relates to cases where the Magistrate *has* jurisdiction to try the case, only the punishment required is more than he can award.

In any case, if a Magistrate, on hearing the evidence, thinks it establishes an offence which he is not competent to try (section 346), he is bound to stay proceedings and submit the case to the Magistrate to whom he is subordinate; this officer will then refer it for trial to some competent Court or hear it himself.

§. 10.—*Magistrate's Jurisdiction as regards Locality.*

Besides this question of jurisdiction as to *extent of power*, and as to *class of cases*, there is yet the question of *locality*. In forest cases there is rarely likely to be any question; the offence is usually an act done in one place, and that is in the district or sub-division of a district, and there is no learning required to determine that a Magistrate at the "Sadr" or sub-divisional "Cutchery" can take it up. Still it may occur that a man has stolen a log in District A, taken it down the river and cut it up or sold it in B, and so on; or a forest clerk has been entrusted with money in District B to pay coolies, and goes off by train and fraudulently conceals for his own purposes part of it in C, and spends the rest in D. I shall therefore briefly describe the sections which deal with *local jurisdiction*, or the place at which a trial or enquiry may be held.

The general rule is (sections 177-8) that the offence is enquired into or tried in the district in which it is committed, or, if sent to the Sessions, goes to that Court to which the Magistrate commits, which usually is the Court of the division, or of the Additional Sessions Judge, who under orders of Government takes up the cases of certain districts.

Offences under the Forest Act follow this general law (sections 5, 29), as there is nothing otherwise said about local jurisdiction in the Forest Act.

The High Court only (section 526) can, to promote the ends of justice or the general convenience of the parties or witnesses, transfer any criminal case from one Court subordinate to it to another, or try it itself, or direct that an offence committed in one district shall be tried in another.

Any transfer from a Criminal Court subject to one High Court to a Court subject to another High Court, can only be ordered by the Governor General in Council. (Section 527.)

It may happen that a person is accused of an offence by reason of an act done and of a consequence which has ensued, and the act is done in one district and the consequence ensues in another; here the trial may be in either (*see* section 179 and the illustrations); so when an act is an offence by reason of its relation to another act which is an offence, it may be tried either in the district in which the act happened, or that in which the act to which it is related happened. (Section 180.) These sections come commonly to notice in cases of *abetment* and receiving *stolen* property. An act of abetment is an offence by reason of its relation to the act which is the primary offence, and it may be tried either in the district in which the crime itself was accomplished, or in that in which the act which constituted the abetment was done. So with receiving stolen goods: here the receiving is an offence by reason of its relation with the theft, and may be tried either where the goods were received or where the theft occurred.

In cases of uncertainty, or when the offence is partly in one district and partly in another, or when it is a continuing offence and goes on in several districts, or consists of several acts done in different districts, it may be tried (sections 182-3) in any of such districts. Instances an offence committed in a railway carriage on a journey, or near the boundary of two districts, and it is uncertain if it was exactly in one or the other[2].

[2] But not so if it is a question of being in British territory, or just outside it; for outside British territory the Court may have no jurisdiction, and then the matter requires nice discussion. In 1880 there was a case of a forest guard of the Nahan State shooting a British subject close to the border between the Amballa District (Panjáb) and the State: the most elaborate enquiry as to the position of the boundary line and that of the man when he fired and of the deceased had to be made and it was ultimately found that the offence was actually committed in Foreign territory.

As regards the case of an offence committed by an European British subject in a Native State in alliance with the British Government, or where a Native Indian subject commits an offence anywhere beyond British India, see section 188.

If there is any doubt which cannot be removed, the High Court may decide in which district the trial is to be held. (Section 185.)

No sentence can be set aside because the trial was in a wrong district, unless it appears that the accused person or the prosecutor were actually prejudiced by the error. (Section 531.)

SECTION II.—INVESTIGATION BY THE POLICE.

§ 1.—*Cases under various Laws.*

We are now in a position to proceed to consider the investigation and trial of offences.

I may repeat once more that under sections 5, 29, of the Code all offences under the Penal Code, as well as those under the Forest and other "special" laws, are triable under the Code by the Courts therein specified, unless there is any provision in the special law otherwise. The Forest Acts contain no such exceptional provisions, save that in Burma, third-class Magistrates are not to try forest cases unless specially empowered.

§ 2.—*Offences how classified for Police purposes.*

There are two great classes of criminal cases, the classification being made on the ground of public convenience and with the object of saving time and securing the due preparation of important cases, so that there may be no failure of justice. In one class the Police take action on receiving complaint or information, and work the whole case out, as far as the evidence for the prosecution is concerned, before it is submitted to the Court. In the other class, the cases are such that they do not require this process ordinarily, but the complainant's deposition, or the evidence he proposes to produce, puts the Magistrate in a position to try the case without difficulty.

The former class of cases is called "cognizable," *i.e.*, by the Police, and the second-class consists of cases "nor cognizable."

For the purposes of investigation "cognizable" offences are recognized by the fact that they are entered in Schedule II appended to the Code, as cases in which the Police may arrest without warrant. Offences against special laws are, as a matter of rule, shown in the

schedule as non-cognizable, if punishable with fine only, or with less than three years' imprisonment; but this is subject to any special provisions of the law, and under the *Forest* Act, offences are (with certain exceptions,—see last paragraph to section 63, Forest Act) specially made cognizable, since the Police as well as Forest Officers, may arrest "without warrant" any one reasonably "suspected" of committing, or having been concerned in, a forest offence (this, observe, includes abetment of forest offences). The Burma Act is the same, save that there, there is no exception.

Under the Procedure Code (section 54) a Police Officer may without a warrant arrest any one,—

(*a*) who has been concerned in a cognizable offence (*e.g.*, the Police officer has seen him);

(*b*) against whom a reasonable complaint of such an offence has been made;

(*c*) against whom credible information has been received;

(*d*) a reasonable suspicion exists;

(*e*) when the person is a proclaimed offender under the Code or by order of the local Government;

(*f*) who has house-breaking tools, or who has in possession what is reasonably suspected to be stolen property;

(*g*) any person who obstructs the Police officer in his duty—or tries to escape, or who has escaped;

(*h*) a deserter from the army or navy;

A person liable to arrest may be pursued by a Police officer into the jurisdiction of another Police officer even in another province. (Section 58.)

If the person to be arrested takes refuge in a house, the powers of the Police officer may be learnt in sections 47-48[3].

As to the *search* of the arrested person, section 51 may be consulted. Every person arrested must be at once taken before a

[3] In all cases where there is time and opportunity, they will do well to get a *warrant* to arrest and a *warrant* to search, and thus they have more liberty of action. See Police Act V of 1861, section 24.

Magistrate, or *before an officer in charge of a Police station.* (Section 60.)[4]

§ 3.—*Preventive action of Police.*

The Police may also take *preventive* action. Every Police officer may prevent the commission of a cognizable offence (Code, section 49, and Forest Act, section 64). If he receives information of a design to commit such an offence, he is bound to communicate the news to his own superior officer, and to any other officer whom it may concern to prevent or take cognizance of the commission of such offence. If it is not possible otherwise to prevent the offence, a Police officer may arrest the would-be offender (section 151), and a Police officer may interfere to prevent injury to any public property or to a landmark, section 152. This would practically give him power to interfere in forest cases, especially intended fires, destruction of boundary pillars, and so forth; but he is expressly empowered and required (as well as a Forest Officer) to *interpose* and *prevent* forest offences (Forest Act, section 64). Persons arrested under the Forest Act are to be taken without unnecessary delay before the Magistrate. (Section 63, Forest Act.) In ordinary cases an officer in charge of a Police station can keep an accused person for 24 hours, but if he has not by that time got the case ready to send up to the Magistrate, he must send up the prisoner and get an order for remand. (Section 124.)

§ 4.—*The process of Investigation.*

The reader will at once perceive that in all cognizable offences the Police will either succeed in making an arrest at once, or after a short pursuit, the offender being known or suspected from the first, or else (what is even more commonly the case), the offence will be known, but the offender has fled, and may not be found till perhaps after a long and elaborate detective investigation.

When an offence is known to have happened, whether or not an offender has been arrested in connection with it under section 54, the *officer in charge of a Police station* having jurisdiction (see

[4] The Police stations in a district, and the officers in charge of them, are matters of organization arranged by the chief Police authorities under Act V of 1861, section 12.

section 156) may at once, on his own authority, commence an investigation. (Section 157.) When the knowledge of the offence comes by an information or complaint to the Police, this will be reduced to writing and signed, marked, or sealed by the complainant, and the substance entered in a book kept for this purpose. On receiving the complaint, or, if there is no complaint, on hearing of or suspecting the commission of a cognizable offence, the Police officer in charge shall send intimation to the Magistrate and proceed himself or send a subordinate to investigate. (Sections 157-8.) The Magistrate who gets intimation may also go himself, or depute a Magistrate subordinate to him, to make investigation. (Section 159.)

When the offence is not serious, and the offender is complained against by name, the local investigation may be dispensed with (section 157, *proviso*); and so, if on other grounds, a local investigation appears unnecessary: but in any case the fact is to be reported to the Magistrate having jurisdiction, and the reasons for not investigating, &c., stated.

In the course of a Police investigation it may happen that search has to be made for stolen property, or other property connected with the case. This is described in section 165. If possible, the officer in charge of the Police station should conduct the search in person; if not, he must give an order in writing, specifying particulars, to have it done by a subordinate, and the search has to be conducted in the same way as a search under a Magistrate's warrant, of which mention will be made afterwards.

The production of any document required can be enforced by an officer in charge of a Police station under section 94.

§ 5.—*Police record of Statements made.*

When making an investigation, the Police officer may require by written order the attendance of any person who is believed to know the circumstances, and such person is bound to attend and answer questions. This extends to the limits of the Police officer's own *and* adjoining stations. (Sections 160-1.) Persons though generally

bound to answer are not bound to answer such questions as tend to criminate themselves.

The statements made may be taken down[5], but are not signed by the deponent, nor can they be used as evidence in a subsequent trial. (Section 162.)

The accused (if one has been arrested) is to be allowed, but not induced by threat or otherwise, to make a statement. (Section 163.) Such a statement may be written down, but only for the Police officer's own information. It is ordinarily not evidence, nor can it be used on a trial in Court. If the accused wishes to make a statement during the investigation (*i.e.*, at any time before the case actually comes into the Magistrate's Court for enquiry or trial), the person must be taken before *any* Magistrate (section 164), who, having ascertained that the statement is voluntary, may take it down in full in the form and with the memoranda or certificates specified in section 364. Such a statement can be produced in evidence.

A statement or confession of the accused to the police can, however, be used in evidence so far as it relates to the finding of property which was indicated thus to the police and which was found accordingly. (See Evidence Act, sections 25-28.)

§ 6.—*Accused when admitted to bail.*

Supposing the Police to have got hold of the accused, then the question arises, is the offence bailable or non-bailable?

This fact is shown, as regards all offences under the Penal Code, in the Schedule II at the end of the Code. As regards Forest offences and others under special laws, unless there is a special provision of the law otherwise (which there is not in Forest cases), all such as are punishable with imprisonment of less than three years, or with fine only, are bailable.

Because they are useful as a guide to the Police. When a Forest Officer, specially empowered, holds a local enquiry (section 71, Forest Act), he is empowered regularly to take down evidence on "oath" (Act X of 1873, section 4) and then, provided it was taken in presence of the accused, it will be admissible as evidence at a subsequent trial.

If the offence is bailable, the accused has a *right* (section 496) to offer sureties, or to deposit cash or Government securities (section 513) and be let go. If the offence is not bailable, he has no such right, and the Police cannot accept bail "if there is reasonable ground for believing that he has been guilty of the offence imputed to him." (Section 497.)

It is only when the evidence is not very strong, and there are not reasonable grounds for believing that the accused has committed the offence, that bail can be taken (section 497, clause 2[6].)

If the Police, however, upon investigation (section 169) do not think that there is sufficient ground to believe the arrested person guilty, or to send him before a Magistrate, then of course section 497 does not apply, and they may take bail, or even a personal recognizance, and report the matter to the Magistrate; but it is to be remembered that by section 63 *no* person who has been apprehended by the Police can be discharged except on bail or his own recognizances[7], or by special order of a Magistrate.

§ 7.—*Remand when the Case is not ready.*

If the person is detained in custody it can only be for 24 hours, as already remarked (section 61), and if the case is not ready by then, an order of a Magistrate for further remand must be obtained, which may be specially given (usually for some urgent reason) by *any* Magistrate, but ordinarily is given by the Magistrate having urisdiction in the case.

§ 8.—*Case sent up to Magistrate.*

While the investigation is going on, the Police must enter all their proceedings in a *diary*. (Section 172.)

Where the Police officer thinks he has not sufficient evidence to send the accused up for trial, he must (as already remarked) (sec-

[6] The form of taking bail and other conditions are found in Chapter XXXIX. I do not think it necessary to go into the matter.

[7] His own bond to appear, on penalty of forfeiting the sum named in the bond, but without sureties for the fulfilment of the terms. In *bail*, the person signs the bond *and also* one or more sureties (as may be thought necessary). who can be made to pay if the person bailed fails to appear, &c.

tion 169) release the person on bail or his own recognizance (according to circumstances) and report the case for the orders of the Magistrate.

When the investigation is complete, and the case is ready to send up for trial, the Police make out a chálán (as it is popularly called), a sheet specifying the names, nature of case, dates, names of witnesses, and so forth, and either the accused accompanies in custody, or on bail or recognizance to appear. (Section 173.)

Witnesses and the complainant execute recognizances to appear before the Magistrate for the trial when called on: and witnesses are not to be accompanied to Court by the Police, or otherwise restrained, unless the witness refuses to attend or declines to sign the recognizance, when he may be forwarded in custody to the Magistrate. (Sections 170-1.)

SECTION III.—CASES ON COMPLAINT DIRECT TO MAGISTRATE.

§ 1.—*Non-cognizable Cases.*

Non-cognizable offences cannot be enquired into by the Police without a special order of a qualified Magistrate. (Section 155, clause 2.)

If complaint is made of such to the Police they will note the substance of the complaint in their diary and refer the complainant to the Magistrate. (Section 155, clause 1.) Thus in non-cognizable cases, as a rule, the Criminal Court takes up the matter direct, on a complaint being made to it. This is probably because the cases of this class are generally more simple, and the complaint and the evidence proposed to be brought sufficiently explain the case. If they do not, and the matter appears to require sifting before the trial begins, an order to investigate must be issued.

Thus in all cognizable cases there is a chálán of the Police, on the basis of which the Magistrate proceeds to try the case (section 170); but in non-cognizable cases, there being no chálán, either some one must make a complaint (191 *a*), or the Police must make a report (191 *b*), or the Magistrate must himself suspect an offence and take steps to institute proceedings (191 *c*.).

§ 2.—*What Magistrates can entertain Complaints.*

It must be recollected that only a District Magistrate, a Subdivisional Magistrate, and a Magistrate specially empowered, can *entertain complaints.* There are also a number of cases in which a prosecution cannot be begun without sanction of some authority. For example, a prosecution for giving false evidence cannot be taken in hand without the sanction of the court before which the evidence is given (see sections 195-9).

§ 3.—*Procedure on Complaint.*

Supposing, however, the Magistrate to be qualified, the first step is to examine the complainant (section 206), and get the complainant to sign this examination when recorded.

Then the Magistrate may either at once issue his process to compel attendance, or first direct an enquiry, by the Police, or by some subordinate officer. (Section 202.)

If, on examining the complainant, there seems to be no case, the complaint may be dismissed, but this will not prevent subsequent proceedings (*e.g.*, if new evidence is found).

For the purpose of proceeding in any case in which the accused is not already before the Magistrate, in custody of Police, or on bail to appear, there will either be a *summons* issued or a *warrant.*

§ 4.—*'Summons' and 'Warrant' Cases.*

Those cases which are punishable with fine only, or with imprisonment for a period not exceeding six months (consequently all offences charged under the Forest Act, except those grave ones mentioned in section 62), are called "summons cases," and a *summons* is the process used to get hold of the accused. [Unless indeed he is about to abscond, when the Magistrate *may* issue a warrant at once.] (Section 204.) A warrant also issues if the summons is not obeyed (section 92.)

Graver cases are called "warrant cases," because ordinarily a *warrant* is issued at once [though the Magistrate *may* issue a summons if he thinks it sufficient to do so.] (Section 204[8].)

[8] The student will thus perceive that Forest cases, as a rule, are cognizable, as the Police may arrest without warrant. If not so dealt with, but a complaint is made to

The summons, or the warrant, according as it is lawful to use one or the other, are the regular means of compelling the appearance of persons, whether as accused to answer, or as witnesses to give evidence. A warrant may also be issued to *search* for property or to find a *document*. It will therefore be desirable, before proceeding to the account of how a *trial* is conducted, to describe the rules under which these *processes* to compel *appearance*, or to find *property*, are legally executed.

I may here repeat that even when an arrest or a search could be made *without* a warrant, it is always advantageous to have a warrant[9].

SECTION IV.—CRIMINAL PROCESSES OF CRIMINAL COURTS.

§ 1.—*Execution of Summons.*

The summons is in writing in an established form and in duplicate; it is usually served through a Police officer. (Section 68.)

It is served *personally*, by exhibiting one copy and delivering or tendering the other. If the personal service is not possible because the accused cannot be found, this *copy* is left with some adult male member of the family *residing with* the accused: this member must *sign a receipt* for the copy. (Section 70.) If this method is impracticable, then the *copy* is *affixed* on some *conspicuous* part of the *house* where the *accused ordinarily resides*. (Section 71.)

Where a summons is applied for to be served beyond the jurisdiction of the Magistrate, section 73 must be referred to.

Summons to persons "in the active service of the Government

a Magistrate, a *summons* will ordinarily issue (except for cases under section 62 of the Act), which are *warrant* cases. And all forest offences (*including* those in which a *warrant* will issue under section 62) are *bailable* by reason of the second schedule to the Code (see at the end of the schedule).

[9] And by section 24 of Act V of 1861, the Police Act, the Police *can also* apply to Magistrate for warrants in *any* offence, and with such warrants investigate and prosecute.

or of a Railway Company" may be sent to the head of the office for service. (Section 72)[10].

§ 2.—*Execution of Warrants.*

This also is in writing, signed and sealed by the Magistrate in an established form. A warrant once issued remains in force until it is cancelled by the court or until it is executed. In case of a remand to custody there must be an express warrant to commit to custody under section 344.

A Magistrate may also direct, in issuing the warrant, that bail may be taken (*i.e.*, that a bond with an indicated number of securities for a specified amount of money for his attendance, be executed), and then when the person is apprehended, if he gives the required bail, he may be let go. (Section 76.)

Warrants are *ordinarily* directed to a *Police officer*, but *may* be directed to any one. (Section 77, see also section 78.)

It should be borne in mind that *any* person who is present in a Criminal Court may be then and there arrested (as if a warrant had been issued) for any offence he may have committed (section 351), and any Magistrate may direct the arrest *in his own presence* of any one for whose arrest he is competent to issue a warrant. (Section 65.)

For warrants to be executed outside the Magistrate's own jurisdiction reference to sections 82 and 83-5 of the Code must be made.

In any case where a warrant cannot be executed by reason of the person absconding or concealing himself, a *proclamation* is read at some conspicuous place of the town or village where the accused resides, requiring him to appear within a period fixed but not less than thirty days. The proclamation is then affixed in some conspicuous part of his house, or at some place in the town or village; also a copy is posted at the Magistrate's court-house. (Section 87.)

At the same time *all* property is liable to attachment. (Section 88.) If the accused does not appear within the time fixed, it may

[10] Soldiers on the march cannot be summoned as witnesses. In ordinary cases they would be summoned through their commanding officers.

be sold and forfeited to Government after six months, unless it is perishable, when it may be sold at once and the proceeds dealt with as the property. Within two years, however, if the person appears and shows that he did not abscond or conceal himself for the purpose of evading justice, he can get the property or the sale-proceeds back.

When the warrant is executed, the substance is to be notified to the person, who may demand to see the warrant (section 80). In making the arrest the person is to be actually touched or confined, 'unless there is submission to custody by word or action.' (Section 46.)

It will often happen that the person to be arrested is in a house, or takes refuge in a house. Generally speaking (section 46), in this and all other cases, the Police officer or other person executing the warrant may *use all means necessary to effect the arrest.*

The persons residing in the house, or in charge of it, are bound, on demand, to allow ingress (section 47), and afford reasonable facilities to search for the person to be arrested. Any outer door, inner door, or window may be broken open, if, after demand duly made, the officer cannot get admission otherwise. (Section 48.) As to breaking open women's apartments see section 48, clause 3. The general rule is to call upon all women to withdraw, and allow them to do so, taking of course precautions that the person to be arrested does not escape, and then the premises may be entered.

Persons arrested under a Magistrate's warrant are always "without unnecessary delay" to be taken before the Magistrate (section 81). See also Forest Act, section 63 (B. *id.*).

§ 3.—*Search Warrant.*

A Forest Officer may be invested with power under section 71*e*, Forest Act (B. 70*c*), to issue a search warrant under the Code.

This power would be advantageously conferred chiefly in charges where there is a large and important timber floating business, as on the Salween, in Burma, and where there is perpetual risk from timber thieves whose premises may require at any time to

be searched to discover timber concealed, unlawfully sawn up to facilitate secret disposal, and so forth.

A search warrant may be issued—

(*a*) when a summons *to produce* a document or thing (section 94) has not been, or is not likely to be, obeyed;

(*b*) where the court considers that the purposes of any enquiry, trial or other proceeding under the Code will be served by a general search or inspection.

The warrant may be either *general, i.e.*, to search any house or place within the jurisdiction of the Magistrate of the district, or *restricted* to the search of a house or place, or even a *specified part* of such house or place. (Section 97.)

Search warrants are usually directed to a Police officer and generally, the provisions relating to ordinary warrants, apply. (Section 101).

In any case the property found is to be taken to the Magistrate, as directed in section 99[1].

Persons residing in or in charge of the house or place to be searched are bound to allow ingress (section 102), and there is the same power as before described of breaking open door or window if ingress cannot be had otherwise, and after due demand. So in searching a zanána, opportunity must be given for women to withdraw, but with precautions to prevent the clandestine removal of property. Before making a search, the officer conducting it *shall call two or more* respectable inhabitants of the neighbourhood to attend and *witness* the *search.* They cannot, however, be afterwards required to attend Court unless specially summoned by the Magistrate. (Section 103.) The *occupant* of the house or place searched has a *right to attend* during the search. It is not said in the Code, but it is a rule of practice that search is made by daylight unless there is an emergent reason otherwise.

If large and heavy logs, for instance, were found, it would, I presume, be necessary to take steps to secure them, and it would be sufficient to *report* the fact and take the Magistrate's order.

SECTION V.—CRIMINAL TRIALS.

§ 1.—*General Features.*

Criminal Courts are open to the public (section 352), but the Magistrate or the presiding Judge may order the exclusion of the public at any particular trial.

The accused has a right to be defended by a "pleader," *i.e.*, Counsel, or by an attorney of a High Court or a professional pleader[2]. He may also, with the permission of the Court, be aided in his defence by a "mukhtár" (under the Legal Practitioners' Act) or a person not being a qualified professional lawyer. (Section 340, and definition clause (*s. v.* "pleader.")

The *examination* of the accused for certain purposes (see section 342) is lawful in all trials and enquiries previous to committal, which is a feature in which our law differs from the English law, as it at present stands. The Code of 1882, it should be recollected, has somewhat restricted the power of examination, from what it was under the Code of 1872-74. The intermediate examination is now confined to enabling the accused (if he can) to explain circumstances appearing in the evidence against him.

§ 2.—*Public Prosecutors.*

A very few words on this subject will suffice. The local Government may appoint such officers (section 492) either for a particular case or for classes of cases, or for all cases[3]. His powers of appearing and pleading and withdrawing charges, and his right to get notice of appeal, are stated in sections 493-4 of the Code.

All Sessions cases *must* be conducted by the public prosecutor (section $\frac{492}{270}$), or some officer specially appointed by the Magis-

[2] Professional pleaders are qualified and allowed under Act XVIII of 1879.

[3] In many places there are no such prosecutors, and it is often a source of inconvenience in forest cases that either the divisional or sub-divisional officer must attend himself to prosecute, or else the case is left to some ignorant Forest Guard or Forester and may fail: to say nothing of the inconvenience of Forest Officers being taken away from their beats so long. This, however, will remedy itself as forest estates get more settled and cases are of sufficient importance to justify special arrangements being made.

trate of the district. Any other Court may permit any person to conduct the case as prosecutor, but no one is entitled so to act without permission. If permitted such person may personally conduct the prosecution or by Counsel. (Section 495.)

§ 3.—*Compounding Offences.*

Generally speaking, when once a criminal charge is laid before the Police or a Magistrate, it must be carried through to the end, and this is especially the case with the graver sort of offences.

There are, however, exceptional cases. Some offences may be lawfully *compounded*, and when the offence itself is compoundable, an *attempt* to commit the offence, or an *abetment* of it, is compoundable also. This may be either before the case is brought into Court or afterwards with the permission of the Court, and then the charge may be withdrawn: the effect of this is the same as an acquittal. (Section 345.)

What offences may be so compounded is now stated clearly in section 345, and also in a column of schedule II. The exception to section 214 of the Indian Penal Code, which was very obscure, has been repealed by Act VIII of 1882.

In any case, however, in which there is a public prosecutor, the official may, with the consent of the Court, *withdraw* any charge. (Section 494.) This operates as a discharge, if made before the charge is drawn up, but as a full acquittal if after the charge is made. In any case instituted otherwise than on complaint, a 1st class Magistrate or any other Magistrate with the previous sanction of the District Magistrate may stop the proceedings and "release" the accused without either acquitting or convicting, or pronouncing any judgment: only reasons must be given for the order. (Section 249.)

In all cases instituted on complaint (section 248), the Magistrate may permit the withdrawal of the complaint, and this done, the same complaint cannot afterwards be re-instituted.

In forest cases, it is not *necessary* to bring to trial any cases but those under sections 61-2. A forest officer *who has been*

empowered may accept, by way of compensation for damage done, a sum of money, on payment of which the offender is free, and property seized, or cattle about to be sent to pound, are released. This payment condones the *forest* offence, but should the act done constitute an offence against any other law, the offender may still be tried under the law. (Forest Act, section 67.) The Burma Act, section 66, contains similar provisions, only the exception mentioned in the Indian Act is not maintained. Indeed, this exception is practically not necessary. It would be extremely unfair to let a man off on the forest charge and then prosecute him under the Penal Code; practically, such a thing would never be done; and if so there is no use in the exception[4]. A forest officer may feel some little difficulty in acting under section 67. For it often happens, that an act constitutes an offence both under the Forest Act and under the Penal Code; in the one aspect it is always compoundable by reason of section 67, in the other, it may not be. The solution is this; if the offence is petty and no great villany is disclosed, then the act may be treated as a Forest Act offence and compounded: if it is grave, the offence should be at once treated as under the Penal Code, or at any rate, as not fit to be compounded.

It is hardly necessary to remark that in all cases where the public prosecutor withdraws, or a complainant abandons the case, this must not be done for a *consideration*, otherwise, if the offence is not by law compoundable the person so acting might be prosecuted.

§ 4.—*Inquiry by Magistrate previous to committing to the Sessions.*

The first kind of criminal procedure described in the Code is when a Magistrate holds *an enquiry* previous to *committing* the case for trial to the *Court of Sessions*. In the Panjáb and other Non-regulation Provinces, where the Magistrate of the district may be vested with, and usually has, the special powers under section 30, it is only offences punishable with death, or other graver offences

See also page 136, note, as to the French Law.

in which even a seven years' sentence would be inadequate, that are committed to the Sessions. In other provinces all cases are so, that are specially noted in Schedule II of the Code as triable only by the Court of Sessions, or are of such a character that the two years' sentence which a Magistrate is competent to pronounce would be inadequate. Such cases are usually, but not necessarily, sent up after investigation by the Police. The proceedings before the Magistrate consist in taking the evidence[5] of the complainant and prosecution witnesses, in the presence of the accused person, who has power to cross-examine. The Magistrate may also call and examine any one whose evidence he considers important, and may recall and re-examine any witness. (Section 219.)

The accused may be examined, but is at liberty to refuse to answer, and cannot be punished for refusing, or if the answers he gives are false: but the Magistrate may draw any just inference from his refusal[6]. The examination properly recorded, is admissible afterwards at the trial as evidence, and so is any statement made before a Magistrate (section 164) before the enquiry. If the evidence does not establish a case for trial by the Sessions Court, but does establish a case triable by a Magistrate, the *trial* may be proceeded with by the Magistrate, or if there is no case the accused is *discharged*. If a Sessions case is *primâ facie* established, the Magistrate draws up a formal charge[7] and commits the prisoner to take his trial before the Court of Sessions or (it may be in some cases, *e.g.*, murder, &c., by a European British subject) before the High Court.

The charge (1), with what is called a "calendar," a formal sheet showing the names of the parties and witnesses, &c. (2), and the record of evidence (3), together with any documents or articles of

The *method of recording* evidence, examinations, &c., will be described in a separate section.

[6] See Evidence Act I of 1872, section 114. The inference may be that the answer if given would be unfavourable to him.

[7] The rules about *charges* will be described in a separate section.

property connected with the case as "exhibits" (4), are sent to the Sessions or High Court.

Witnesses for defence are not usually called at the enquiry, but the accused must give a list of the persons he wishes to have summoned for the trial. (Section 211.) A Magistrate is bound to summon these (section 216) unless he thinks that a witness is included for the purpose of vexation or delay or defeating the ends of justice, and then he may require the accused to satisfy him that the witness is material, and, in doubt, may refuse to summon unless a sum of money to repay the expenses of the witness is deposited. (Section 216, clause 3.)

The charge must be read *and explained* to the accused, and a copy or translation given him if he so requires. (Section 210.)

I shall not describe the trial before the Sessions or High Court. It is conducted in the latter case with a Jury, and in the former with Assessors, unless a Government order has introduced trial by Jury. The whole procedure is under Chapter XXIII[8]. The forest officer is so little likely to have anything to do with such trials that it is not necessary for him to enter on the study of the procedure.

§ 5.—*Trial of Summons Cases.*

I have already indicated that cases triable by Magistrates are classed into "summons cases" and "warrant cases" according as a summons or a warrant ordinarily issues in the first instance, to compel the appearance of the accused person.

Summons cases are also tried with less formality. The chie features about a summons case are—

(1) that no formal charge is drawn up. The complaint and summons indicate the nature of the case and the facts to be enquired into, and the Magistrate may convict or acquit of any offence which from the facts he appears to have committed or not to have committed. (Section 246.)

[8] The separate procedure law for High Courts, Act X of 1875, is now repealed. All provisions are now contained in one Code.

(2) The complaint may be withdrawn under circumstances already stated

(3) The evidence is recorded shortly, not in full, as will presently be described.

If the complainant does not appear at the hearing, or at an adjourned hearing, the *complaint* must be *dismissed* (section 247), unless the Magistrate thinks fit to grant an adjournment or a further adjournment as the case may be.

If he appears, the substance of the complaint is stated to the accused, who is asked if he has any cause to show why he should not be convicted. (Section 242.) If he admits the case and shows no cause, this is recorded and he may be convicted. If he denies it, the evidence for the complaint is heard, and then such witnesses *as the accused produces* are heard in his defence. (Section 244.)

It is ordinarily the duty of both parties in summons cases (not being cognizable cases) to produce their own witnesses; but the Magistrate *may* grant summons and *may* adjourn the case (section 244). The parties should therefore, if they think the witnesses will not attend, apply for summons before the date fixed for hearing so as to avoid the risk of being refused an adjournment. If a summons case happens to be cognizable by the Police, the Police would produce the evidence under the usual procedure already described. If a forest officer has made the arrest and taken the accused before the Magistrate, he would either get an investigation through the Police, or produce his own witnesses, or apply for summons.

In all trials of forest offences, whether summons or warrant, if a forest officer has been empowered under section 71 of the Forest Act, and has made an enquiry into the offence, and has received and recorded[9] evidence *in the presence of the accused*, this evidence may be put in at the trial and is receivable. (Section 71, Forest Act; B. 70.)

[9] He should do this in full, either taking it all down in full narrative form in his own hand, or, if a European officer, causing it to be so taken down in vernacular and making a memorandum of the substance at the same time himself in English, or taking the whole down in full in English.

When the evidence has been heard, the Magistrate may find the person guilty and convict, or may dismiss the case and acquit the accused. If he find cause to dismiss the complaint as frivolous and vexatious (section 250), he may award a sum not exceeding Rs. 50 (recoverable as a fine) as compensation to the person wrongfully accused.

In Forest cases, in the case of a conviction under section 25 of the Forest Act, but *not* under section 32, the Court may, in *addition* to the punishment, order compensation for the damage done to be paid. So in the Burma Act with reference to section 26.

§ 6.—*Trial of Warrant Cases.*

I may here remark that it is not always necessary to go through the whole form of trial when the accused admits the case: this is equally true of summons and warrant or any other cases.

By section 256, the Magistrate may always convict on a man's own admission, but need not; and indeed, in any grave case, or any case in which there is the least reason to suppose the man was admitting the case out of fear or being influenced or confused, or merely from stupidity or ignorance, the Court would not convict without taking evidence.

In a trial of a warrant case the chief features are—

(1) The complainant and his witnesses are first examined and may be cross-examined by the accused;

(2) The evidence is taken down in full;

(3) If no offence is established accused is *discharged*, which will not prevent his again being brought up on new or additional evidence;

(4) A formal *charge* is prepared setting forth the offence;

(5) The defence and witnesses are heard;

(6) A final judgment, which must be either of *conviction* or *acquittal*, and sentence (in the former case) is passed.

A discharge cannot be ordered before the prosecution witnesses have been heard (unless the complainant is absent and section 250 applies). When the charge has been drawn up and read and

explained to the accused (after the prosecution witnesses have been heard) he is asked if he is guilty or not guilty. If he pleads not guilty, or has a defence to make, he is called on to enter upon it (section 256), and to produce his witnesses if in attendance. He may also recall and cross-examine the prosecution witnesses. If his witnesses are not present, the Magistrate is *bound* (section 257) to summon them[10], but is not bound to adjourn the case (section 344) (so that the accused should, if possible, summon his witnesses beforehand when the case first came up, before the date of trial is fixed, as is evidently intended by section 362[1].)

If the Magistrate, after the defence is concluded, finds the person not guilty, he records a judgment of *acquittal;* if guilty, of *conviction.* After the charge is once drawn up, no other result but acquittal or conviction is possible. (Section 258.)

§ 7.—*The Judgment.*

It will be sufficient for the forest officer to know, regarding the nature and contents of the *judgment*, that it is accompanied always by a formal sheet, showing the "*finding,*" which if for "not guilty" directs the accused to be acquited, and if "guilty" directs that he suffer such and such a sentence. The judgment is a review of the case, giving reasons for finding the prisoner guilty or not guilty as the case may be.

The separation of the "judgment" and the final "finding sheet" is a matter of practice: it is all included in the term "judgment" as used by the Code. (Section 367.) The judgment must be written by the presiding officer himself in English or the language of the district. Judges who know English may use that language only if they can do so sufficiently to make out a clear and intelligible judgment. (Section 367.) The offence found

[10] Subject to the precaution in case witnesses are inclined to cause delay, &c., section 257.

[1] Of course if some new point come out in the trial which it was not reasonable to expect the accused to know beforehand, and he declares himself able to produce evidence to refute it, the Magistrate *would* always grant an adjournment to enable such witnesses to be summoned.

must be clearly stated, and it must set forth these points for determination, the finding on them, and the reasons for that finding. It is *dated* and *signed* by the Judge in open Court, at *the time* of *delivering it.* After this it cannot be altered or reviewed by the Judge himself.

8.—*Incidents of Trial.*

It may sometimes happen in the course of the proceedings that the case turns out to be really one which the Magistrate is not competent to try, or that it discloses facts of a nature which make a case more appropriate for a Sessions trial: then the Magistrate must stay proceedings, and either commit to the Sessions (if he is empowered so to do), or refer to a Magistrate with powers under section 30. (See sections 346-7.)

And generally if in the course of the proceedings (section 346) it appears to a Magistrate that he is not competent to try or to commit to the Sessions, he must stay proceedings and refer to the Magistrate to whom he is subordinate.

In such cases the Magistrate taking up the case must begin *de novo,* but any statement of the accused duly recorded may be put in evidence.

Another incident likely to happen is that contemplated in section 349. A Magistrate having the limited powers of the second or third class, may have jurisdiction to try a case, and yet if he may find that the facts disclose an offence which demands a severer punishment than he is authorized to award, he can then record a finding of guilty but pass no sentence and submit his proceedings to the District or Sub-divisional Magistrate to whom he is subordinate. (*See* page 362.)

A District or a Sub-divisional Magistrate may (section 528) withdraw any case from a Subordinate Magistrate and try it himself, or make it over for trial to any competent Magistrate.

A person once acquitted or convicted cannot be tried again on the same facts. But the circumstances under which another trial is possible (as for example where a man is convicted of causing

grievous hurt, and the victim afterwards dies, so that the case becomes one of murder or culpable homicide, &c.), are clearly stated in section 403 and the numerous illustrations to that section, to which the reader may refer on occasion.

9.—*Summary Trials.*

In order to facilitate the speedy disposal of petty cases of all kinds, a method of trial, even simpler and briefer than that of the summons case, has been provided.

It is often, of course, proper to class an offence in the category of more serious crime, and yet instances of the offence may be very petty in character. Theft is in its general nature a serious offence; but the act of stealing a piece of cloth worth 2 annas hardly demands a very formal or detailed trial. Consequently all the offences specified in section 260, which include all summons cases, and as many warrant cases as are there specified, may be tried "*summarily*" by the *Magistrate of the District*, or by a Magistrate of *first class specially empowered.* (Section 260[2].)

Forest offences are, by section 65 of the Forest Act, brought under these provisions, provided the offence is not punishable with more than six months' imprisonment. Practically that means that all forest cases, small enough to be prosecuted under the Act (except those described in section 62), may be tried summarily. In Burma the Forest Act does not allude to the matter because it is not necessary. As forest offences are mostly punishable with fine only or with imprisonment not exceeding six months, or with both, they are *summons* cases, and therefore (there being no special provisions otherwise) they are triable under the Criminal Procedure Code, and consequently may be tried summarily if they come before the class of Magistrate empowered to try summarily any kind of cases.

In cases where Government has constituted a Bench of Magistrates, the Bench may be specially empowered to try summarily; but in that case the provisions are somewhat varied. As Magistrates' Benches usually sit in large towns, and their procedure is not likely to come under a Forest Officer's notice, I do not allude to the subject.

It should be recollected that in a *summary trial it is the form of record that is shortened and simplified, not the procedure itself.* (Section 262.) The procedure of a warrant case or a summons case is still followed according as its nature is one or the other. No sentence of imprisonment exceeding three months can be passed on a summary trial.

If the case is one in which there is no appeal, no record is made at all of evidence, nor is there a charge or formal judgment; but a *register book* is kept up with the headings specified in section 263, which may be referred to for details, but which in brief exhibits the names, dates, result of trial, and other salient and necessary facts of the trial and its result.

If there is an appeal, then the register book is not used, but the Magistrate records a judgment or single proceeding, in which the reasons for his decision and the substance of the evidence, and the particulars which would be otherwise entered in the book are embodied. (Section 264.)

The table annexed will show at a glance how these three forms of trial just described, differ.

Order of Proceeding and Form of Record, compared in—

Warrant Case.	Summons Case.	Summary Trial.
Accused if not in custody (in cognizable cases) is brought up on Magistrate's warrant. Personal appearance necessary.	Accused (if not on bail from a police investigation in cognizable case) appears in pursuance of a summons. Personal appearance may be dispensed with. Offences always bailable.	Accused brought up according as case is under 1st column or 2nd. I. If no appeal lies.[1]
Offences often not bailable, but many are bailable.		No record or formal charge. Proceedings all *vivâ voce* in same order as in regular trials, but record only in register book in columns.
1. Evidence of complainant and witnesses [recorded in full.] [Police produce witnesses in cognizable cases. Magistrate summons in non-cognizable cases.]	1. Substance of complaint stated to accused he is called on to show cause why he should not be convicted: if he does not, may be convicted at once: if he has a defence—	
2. If no *primâ facie* case accused discharged.	2. Evidence heard on both sides. [Not recorded in full. Magistrate makes memorandum of its substance.] [Parties ordinarily produce their own witnesses in non-cognizable cases:—may apply for summons.]	II. If there is an appeal— No register book, no record or formal charge, but a single document, a judgment, stating all facts and containing the substance of the evidence given, and the sentence or acquittal.
3. Formal charge drawn up. Accused called on to plead.	3. Complaint may be dismissed as frivolous and compensation given.	
4. Defence and witnesses heard. [Magistrate bound to summon witnesses.] (Section 257).	4. No formal charge: any offence that the facts disclose may be found.	
5. Judgment and finding—must be either "acquitted" or "convicted."	5. Judgment can only be for acquittal or conviction.	
May be an adjournment, inquiry for absent witness, and from time to time (see section 344).	Absence of complainants on day of trial or subsequent adjourned hearing (section 344) enables Magistrate to dismiss case. (Section 247.)	
Withdrawal not allowed, except if the public prosecutor withdraws (see also section 240).	Complaint may be withdrawn.	

[1] *i.e.*, sentence not exceeding three months, or fine not exceeding Rs. 200 only, or whipping only; appeal *is* allowed if two or more are combined and *always* to European British subjects, whatever the sentence.

SECTION VI.—THE METHOD OF OBTAINING ATTENDANCE OF WITNESSES AND OF RECORDING EVIDENCE AND EXAMINATION.

§ 1.—*Oath or Solemn Affirmation.*

All witnesses are examined on oath, or if they object to an oath, or are Hindus or Musalmans, on solemn affirmation (this is under the oaths Act X of 1873). Accused persons, when examined, are *never* subject to oath or affirmation.

§ 2.—*Form of record.*

The ordinary way of recording evidence in an enquiry previous to committal, or in a warrant case, is for an officer of the Court to take down the whole evidence in the language of the district, in the presence and hearing of the presiding officer, who signs this record of each statement. It is recorded in narrative form, not in form of question and answer; but any particular question and the answer may be recorded. (Section 356.) The presiding officer, *as this goes* on, takes down *with his own hand* a memorandum of the substance of the evidence, and this also forms part of the record and is also signed by the presiding officer.

Native Magistrates in such cases usually take down the whole evidence themselves, for there would be no object in having a full record, and a memorandum of substance in the same language.

In important trials the Magistrate or Sessions Judge takes down the whole evidence in full, with his own hand, this being specially directed by the Local Government. (*See* section 357.)

In petty cases, even though, according to class, they are warrant cases, but are specified in section 260, clauses *b to k*, and which would be tried summarily by the Magistrate of the district or an empowered Magistrate, if they are tried by a first or second-class Magistrate *who is not empowered* to try summarily, the ordinary detailed record is not required, and the record, *as provided in a summons case*, is adopted. (Section 355.)

The Local Government may (section 356) issue orders directing that a particular method (one of the above) be followed; in each province it is necessary to ascertain if any such orders are in existence. The above, however, is the usual practice.

In summons cases (section 355) not being tried summarily, a memorandum of the substance only is made by the Magistrate, and this is signed by the Magistrate and forms part of the record.

There is nothing, however, to *prevent* a Magistrate from adopting the fuller record of evidence, if under the circumstances he thinks it right to do so. (Section 358.)

At the end, the Magistrate must record such remarks regarding the demeanour of the witness while under examination as he thinks necessary. (Section 363.)

§ 3.—*Examination of Accused.*

Whenever an accused person is examined, though no oath or affirmation is administered, no inducement offered to make him speak, and no punishment for refusing to answer or answering falsely, can be given, his examination is recorded in the manner provided by section 364.

§ 4.—*Other Matters.*

It is not necessary for the forest officer to go into the details of the *tender* of *pardon to accomplices,* and making them what is popularly called "Queen's evidence." This is described in section 337[3].

In some cases of medical evidence and Chemical Examiner's Report, the deposition is admissible without personal attendance of the witness. It is not necessary to go into details.

If an accused person absconds and cannot after pursuit be arrested, there is a special provision (section 512), which I may just allude to, for taking down the evidence of witnesses; and afterwards, if the accused person is arrested, and the witness cannot then be produced without great delay and inconvenience, or if the deponent is dead, the evidence so recorded may be put in at the trial.

§ 5.—*Obtaining the Attendance of Witnesses.*

In warrant cases a large number will be cognizable by the Police and the prosecution witnesses will be got by the Police and be

[3] The Code of 1882 still confines this to cases triable exclusively by the Court of Session or High Court.

under their own recognizances to appear and give evidence. In other warrant cases, as well as to obtain attendance of witnesses for the defence, a Magistrate's summons is issued.

In summons cases, the parties, as already remarked, usually produce their own witnesses, but summons may be applied for if necessary.

When the Court has reason to believe that any witness will not attend without being compelled a warrant may be issued. (Section 90.) And so if a person summoned neglects or refuses to appear, then, *on proof of service,* and if no reasonable excuse appear, a warrant may be issued. (Section 90, clause *b*). If the warrant cannot be executed, and the Court thinks that the witness has absconded, or is concealing himself, a proclamation may be issued under section 87, and *movable* property may be attached.

The attachment shall be within the local jurisdiction of the Magistrate, but may be made outside, if the warrant is endorsed by the Magistrate of the jurisdiction in which the property is.

If the witness appears and shows that he is not intentionally avoiding service, or absconding, the property may be released (or if sold, the proceeds), subject to such order about the costs of attachment as the Court may give. (Section 89.)

§ 6.—*Witness refusing to answer.*

A person *refusing to answer* (of course this does not refer to an *accused* person), may be committed to custody for a term not exceeding seven days, unless, in the meanwhile, he consents. (Section 485.) If, in spite of this coercion, he persists in refusing, he may be dealt with for a contempt of Court under sections 480-1 of the Code.

7.—*Commission to absent Witness.*

It sometimes happens that a witness lives at such a distance that his attendance cannot be had without great delay and inconvenience, in such cases the code provides for his examination by commission. For details Chapter XL of the Code must be referred to.

§ 8.—*Expenses of Witnesses.*

Under section 544 the reasonable expenses of a complainant or witness may be defrayed by the Court subject to the local rules which the Local Government is empowered to make. These exist in all provinces and must be consulted.

The Police manage this in Police cases, and the local rules give scales of rates according to the class and circumstances of the witness.

In petty cases, where there is no public interest involved, only a dispute between the two parties, the Magistrate would not as a rule pay anything. In summons cases the parties usually produce their own witnesses, and when they apply for summons, the Magistrate will not grant expenses from the public funds, except it appears to him that the prosecution was desirable in the interests of public justice.

All forest prosecutions would of course be in the interests of public justice, and the expenses would be paid by Government.

SECTION VII.—THE CHARGE IN WARRANT CASES (*with special reference to Forest cases*), AND ITS INCIDENTS.

§ 1.—*The Form and Object of the Charge.*

The reason why I devote a separate though brief section to the subject of the "charge" is that though the form and contents of it are more a matter for the Magistrate than for the forest officer to study, still there are certain questions connected with charges, such as the trial of several offences on one charge, and the trial of several persons having different degrees of connection with the transaction that forms the subject of the trial, at one time, which it may be desirable for the forest officer to understand.

The "charge" is a formal sheet attached to the proceedings. Its object is to inform the accused (who should be clearly described by his name, father's name, and so forth) that he is charged with a definite act committed on or about a certain date, at a certain place, which act constitutes an offence coming under such and such section of the Penal Code or otherwise, and within the juris-

diction of such and such a Court. The charge sheet also directs that the prisoner be tried on this charge.

2.—*Description of the Offence.*

The charge need only specify the offence by the name which it bears in the Code or other law, but if the law does not give the offence to specify name (as "lurking house trespass"—"culpable homicide," &c.), then so much of the definition or description of the offence, as will clearly inform the accused what he is being tried for, must be entered. It is not necessary to state in the charge the absence of *exceptions* and so forth. The mere mention of the offence charged implies every legal condition required by the law to constitute the offence. It is ordinarly for the prisoner in his defence to show the existence of exceptions, as that he was out of his mind: but there are cases in which the prosecution has to prove the absence of certain conditions: that however has nothing to do, with the contents of the charge.

A charge may be amended at any stage of the proceedings. (Section 227, but see sections 228 and 231.)

§ 3.—*Charge of several Offences.*

When a man has committed a number of offences one after the other, he may be tried for three of them at one time, provided that they happened within a year of each other. This frequently happens, when a professional thief is caught and he has been on a thieving tour, in which he may have successively robbed half a dozen houses. (Section 234.)

§ 4.—*Several Offences in one Transaction.*

It often happens that a single set of facts, connected and forming one transaction, nevertheless gives rise to several offences. Such offences may all be entered as "counts" on the charge and tried at one time. For example, A with six others, commits the offence of rioting, and in so doing causes grievous hurt, and also assaults a public servant, who in the course of his duty endeavours to suppress the riot. Here there is one transaction, but three offences, under sections 147, 325 and 152 (Indian Penal Code), have

been committed, and all may be entered in one charge sheet and tried at the same time.

It may also happen that a single act or transaction falls within two separate definitions of offences: here the charges may specify each of the offences committed, but the accused can only receive one punishment, which may be the *maximum* that could be awarded for either; and so if several acts combined form one offence, and one or more of the separate acts also are in themselves offences. For example, a person may break into a house (itself an offence), may commit adultery with a woman in the house (second offence), and afterwards may carry off some of her jewellery (third offence). Here he may be tried for all the separate offences, but gets only one punishment, which may be the *maximum* that can be inflicted for either. (*See* section 71 of Indian Penal Code as amended by Act VIII of 1882.) In connection with offences made up of several acts, the first clause of section 71, Indian Penal Code, must be remembered. Supposing a man commits the offence of causing hurt or using criminal force by striking 50 blows with a cane, here each blow is in itself an offence, but the offender could not get 50 punishments, one for each blow, but only one punishment for the whole beating.

§ 5.—*Charge in case of doubt which Offence is established.*

Lastly it may appear that a single act or set of acts is of such a nature that it is doubtful which of several offences the facts proved will constitute, though they will certainly constitute one or other. Here the charge may be framed in the alternative that the accused did so and so, and thereby committed either this offence or that. A person, for example, may be accused of acts which may amount either to theft, to receiving stolen property, or criminal breach of trust, or cheating. (Section 236.) In such cases, if only one offence is actually charged and the evidence shows a different offence to be appropriate to the facts proved, the accused may be convicted of the offence proved[4] (section 237); and so where acts

A person charged with theft is often found guilty of criminal misappropriation for example.

are charged, the whole of which are not proved, but the part which is proved still constitutes an offence. (Section 238.)

For example, a charge may set out that accused has "committed breach of trust as a carrier of goods": proof may fail that he was actually a carrier, but still the rest may be proved: here then he may be lawfully convicted of simple "breach of trust."

§ 6.—*Various Persons concerned in one Offence.*

It often happens that several persons are concerned in one offence, some as principals, others as abettors: some may have actually committed offences: others may have done what amounted to an attempt only. Also the several persons engaged in one transaction may have done different acts which constitute different offences. In all these cases the Court may decide (section 239) whether it is convenient to try them together (appropriate charges being made against each), or separately.

SECTION VIII.—EXECUTION OF SENTENCE AND RECOVERY OF FINES.

§ 1.—*Imprisonment.*

Passing over the confirmation and execution of sentences of death and transportation, I proceed to sentences of imprisonment. A special warrant, signed and sealed by the Judge or Magistrate, is necessary. (Section 383.) This warrant is returned by the Jailor when the time is up (or if otherwise the prisoner is released on due authority), and with an endorsement under his signature showing the manner in which the sentence has been executed.

2.—*Recovery of Fine.*

Fines are levied as directed in section 386. The Court may issue a warrant for levy by distress and sale of any *movable* property belonging to the offender: and this is done in all cases whether there has been a sentence of further prison in default of payment or not, since the fine has to be recovered if possible in

any case. But of course as soon as the fine is paid, the prisoner, suffering only in default of payment, is let go, and if a part is paid a corresponding part of the term also is remitted. (Indian Penal Code, section 69). This is a matter of substantive law, being part of the nature and condition of the punishment of fine; so also it should be remarked that the time within which a fine remains leviable, and the liability of heirs to pay the fine are matters of *substantive* law. (Indian Penal Code, section 70.) Fines when recovered can always, under section 545, be devoted to (1) *compensate* deserving persons for expenses incurred properly in prosecuting the offender; (2) in compensation for the offence.

Under the Forest Act special power is given, under section 75, to the Local Government, to make rules for the payment of fine proceeds, in reward to informers, which, it will be observed, is not contemplated by the Procedure Code.

3.—*Imprisonment in default of Fine.*

In cases where imprisonment as well as fine is awardable for the offence, imprisonment in default of fine cannot, by the Penal Code, exceed an additional fourth part of the imprisonment provided for the offence. The Procedure law further restricts each particular Magistrate ordering imprisonment in default to one-fourth *his particular powers*, if there is a substantive sentence of prison besides; and such order must not, of course, be in excess of the term allowed by the Penal Code.

If the Magistrate might have awarded imprisonment as well as fine, but only awards fine, then the imprisonment in default may be up to one-fourth of the imprisonment prescribed for the offence, without the further restriction just alluded to. (The Magistrate cannot of course exceed his full powers in any case.)

Where the punishment awardable is fine only, the term in default is regulated by section 67, Indian Penal Code, and the imprisonment is simple: it may, as far as Procedure law is concerned, amount to the whole term for which the Magistrate is competent to imprison.

4.—*Cumulative Sentences.*

The subject of cumulative terms of imprisonment when the accused is convicted of several offences, has been to some extent illustrated under the head of "Charges," but where several punishments are legally imposed, one to begin when the other ends, the Magistrate is not held to exceed his powers, or the case to require trial by a higher Court, because of the several sentences. But there is a limit to cumulative sentences, and for this and other details section 354 must be referred to. For special cases of sentence, where the person has been convicted previously, see section 348, and section 75, I. P. C.

5.—*Reformatory.*

Youthful prisoners (under 16 years of age) may be sent to a Reformatory instead of to prison. (Section 399.)

6.—*Remission of Punishment.*

The power to remit punishments is reserved to the Local Government or the Governor-General in Council. (Section 401.)

SECTION IX.—APPEAL, REVISION, &c.

1.—*To whom Appeal lies.*

An appeal lies to the District Magistrate from *any conviction* by a Magistrate of the second or third class, or (under section 349) by a third-class Magistrate where sentence is given by a Sub-divisional Magistrate of the second class. (Section 407.) The District Magistrate may make over the appeal to any first-class Magistrate empowered to hear appeals.

The appeal from the Magistrate of the district, or Magistrate of first class, lies to the Court of Session.

If the District Magistrate had powers under section 30, and it appears from the proceedings that he held the trial under those provisions, the appeal is to the High Court, *not* to Sessions. I do not speak of appeals from Sessions: they are to the High Court, but there is no need for the forest officer to go into this.

Except (in Sessions trials with jury) the appeal is either on points of fact or *law*. (Section 418.)

Petitions of appeal must be accompanied by a copy of the judgment. (Section 419.) No "Court fee" (judicial stamp) is required for an appeal in criminal cases.

§ 2.—*Cases where there is no Appeal.*

There is no appeal from an order of acquittal unless the Local Government direct it under section 417.

There is no appeal in any case where—

A Court of Session,
A District Magistrate, or
A Magistrate of the first class

has passed a sentence of imprisonment not exceeding one month only, or of fine not exceeding Rs. 50 only, or of whipping only; nor from a sentence of imprisonment in *default* of fine where no substantive sentence of imprisonment is passed; nor from a judgment convicting a person on his own plea, *except as to the legality or extent of the sentence* (which is, of course, a matter with which the prisoner's plea had nothing to do, as a matter of admission.) (Section 412.)

There is no appeal in cases tried *summarily* in which the sentence does not exceed three months' imprisonment only, or fine not exceeding Rs. 200 only, or of whipping only[6]. (Section 414.) But in this case and the last, a *combination* of punishments gives right to an appeal.

All convictions by second and third-class Magistrates are appealable.

All convictions of an European British subject by a Magistrate or the Court of Session (anything in the above section notwithstanding) are appealable: cases before the Magistrate to the Sessions, and Sessions cases to the High Court. (Section 416.)

If a prisoner in jail appeals, see section 420 for procedure.

Except in cases of certain Benches of Magistrates which I have not explained to the forest officer, as not likely to come within his range of practice.

Except in these and other[7] cases where an appeal is expressly *allowed* by the Code or some other law, there is no appeal from any judgment, sentence, or order of a Criminal Court. (Section 404.)

Thus in a matter of *compensation* out of proceeds of fine, there is no appeal. It will be observed above that the appeals allowed are from Magistrate's *convictions*, and that an especial rule is made about *acquittals:* consequently, there is no appeal from an order *discharging*, or *dismissing a complaint:* and generally the clear rule is, you must point to the *express* provision for an appeal or there is none under the Code. Confiscation proceedings, where the property only can be dealt with, the offender not appearing under the Forest Act, are specially made appealable by section 58 of the Forest Act.

There is no *second* appeal (*i.e.*, appeal from an appellate order) in any criminal cases except in cases where the Local Government appeals from an acquittal. (Section 417.) But an appellate order may be *revised* by a High Court under section 439.

3.—*Procedure on Appeal.*

The procedure on appeal is learned from section 422 *et seq.*, which may be referred to.

The appeal may be rejected on the petition only without sending for the record.

I would call forest officers' attention to section 422. The Appellate Court, if it decide to hear the appeal, gives notice to the appellant and to some one appointed by the Local Government on behalf of the prosecution. It is probable that further rules will be issued about this. Under the Code of 1872 the notice went to the District Magistrate. Whoever receives the notice, he should be asked to let the forest officer know in all

[7] I have not spoken of the "other cases" but only of appeals from Magistrates and other convictions and acquittals on *trial*, because these are the only cases a forest officer is likely to want to know about. But there may be other matters, such as order to find security for good conduct, to maintain a wife or child and so, to put a name on the jury list. If there is an appeal, an express provision will be found.

forest cases, as in the present stage of *growth* of the department with so many legal questions on which final judicial decision is valuable, it is important that when forest cases are on appeal before a Court whose rulings are *published* or used as *precedents*, the forest jurisprudence of the question should be adequately represented.

An Appellate Court is competent to alter or reverse a sentence and order, or to order a retrial, but it cannot enhance a punishment. (Section 423.)

Pending an appeal, the sentence may be suspended, and if the offence is bailable an offender may be released on bail. (Section 426.)

4.—*Irregularities in Procedure.*

Chapter XLV is important. No finding or sentence of a *competent* Court can be reversed or altered by reason of an error or defect, in the charge in the proceedings before or on trial, on account of improper admission or rejection of evidence, unless the error has occasioned a failure of justice. Thus it will be observed that primary technical matters and errors of form, not affecting the *justice of the case*, are not matters on which an appeal will be successful.

§ 5.—*Revision.*

The High Court, the Court of Session, and the District or specially empowered Sub-divisional Magistrate, may call for the record of any case in any subordinate Court for the purpose of satisfying itself of the—

(*a*) Legality or propriety of any finding, sentence, or order.

(*b*) Regularity of proceedings. (Section 435.)

As the result of the revision of the record—

(1) The Court of Sessions or Magistrate of the District may order a person improperly discharged in a case exclusively triable by Sessions Court, to be arrested and committed for trial (section 436)

(2) The High Court or Session Court or District Magistrate may also order further enquiry into complaints dismissed under section 203, or into the case of *any accused* person discharged.

(3) The Session Court or District Magistrate may report any illegality, or excessive or insufficient punishment to the High Court.

The High Court has power to remedy every defect as described in section 439.

When exercising these powers of revision, no one has any *right* to be heard, but the High Court *may*, if it thinks fit, hear such person either personally or by agent[8]. (Section 440.)

SECTION X.—TRIAL OF EUROPEAN BRITISH SUBJECTS.

As forest offences may be committed by European British subjects, it is necessary briefly to indicate the provisions specially made regarding their trial.

The reason why such provisions are made, is simply that European British subjects carry their own law with them, and cannot, by the act of coming to India, be deprived of certain rights which are inherent in their nationality; so that, at least in essential points, they are entitled to have the same advantages on trial in India, as they would have in England or the Colonies. The right to be tried by a jury in all cases other than those of a petty or summary nature (such as would be tried by single Magistrates or Quarter Sessions at home) is the principal right of this kind.

For the definition of an European British subject the student will refer to section 4, clause *u*.

And, as I urged, in important forest cases should be moved to do so. My own experience has been that important points get overlooked in these Revision cases. And unfortunately so much prejudice still lingers about forest matters that it is possible that cases may be so reported as unconsciously to mislead as to the facts and surroundings of the case. In such cases it is most important that some one instructed in the many little known principles of forest law, should be heard and allowed to represent the other side.

For the enquiry into cases previous to committal or their trial, it is necessary that the Magistrate should be himself a European British subject, that he should be a Justice of the Peace[9] and a Magistrate of the first-class: all three qualifications must be possessed concurrently. (Sections 443-4.)

Any Magistrate who can entertain complaints may go as far as taking up the complaint, examining the complainant, and issuing the process to compel appearance; but if not competent to hear the case he must make the summons or warrant returnable before a Magistrate who is. (Section 445.)

Any Magistrate's case (schedule II), in which an European British subject is charged, may be tried by a competent Magistrate; but the sentence cannot exceed three months' imprisonment or fine up to Rs. 1,000, or both; so that if the case requires a heavier sentence than that, and if it is an offence not punishable with death or transportation for life, the case is committed to the Sessions, or, if punishable with death or transportation for life, to the High Court.

The power of Sessions Judges in these cases is also limited by section 449.

When the trial is with Assessors, or with a Jury, the prisoner may require that not less than half in either case, shall be Europeans or Americans or both. (Section 451.)

European British subjects in custody, and considering such custody unlawful, have a special right (section 456) of applying to a High Court, in manner described in the section.

It is the duty of the accused to claim that he is an European British subject; there is an appeal from an order declaring that the prisoner is not an European British subject in the manner described in section 453. A person not claiming to be a European British subject is held to waive his privilege[10].

[9] Now appointed under Act II of 1869: the use of this appointment practically amounts to this only, that it is a formal way of investing particular Magistrates with power to act in European British subjects' cases.

[10] The privilege can be forfeited also under certain circumstances of vagrancy. (Act XXI of 1869, section 30.)

Subject to these provisions the trial of an European British subject is entirely under the Criminal Procedure Code. (*See* section 463.)

Europeans or Americans not being British subjects, are triable before the ordinary Courts. When the trial is by jury or with the aid of assessors, the accused may require to have half of them Europeans or Americans (if this is practicable). (Section 460.)

SECTION XI.—MISCELLANEOUS PROCEEDINGS.

It was prescribed in former Codes that all miscellaneous proceedings, not being trials such as I have described, are to be held with procedure as nearly resembling that on a trial as possible. This is still true but it was not thought necessary to repeat it in the new Code.

In forest cases, the proceedings on an application to confiscate (Forest Act, sections 53-6) are of this nature.

Ordinarily, the result of the forest officer's seizure and report to the Magistrate is to produce an offender, and then there is a regular trial, and the Magistrate makes an order for the disposal of the property seized at the close of the trial. But there are many cases where timber which has been cut unlawfully has been found in the forest, and it is uncertain who actually cut it: or it may bear the mark of some company or contractor, who may have had nothing to do with the actual felling and cannot be charged criminally. Here then the forest officer will seize it, and institute the proceeding under section 56 of the Forest Act, in order to recover the property.

The student should refer to the account given regarding confiscation cases at page 346, *ante*.

Here the general procedure will be followed, as regards summons to parties and witness, recording a memo. of the substance of evidence (as in a summons case) and recording a judgment explaining the order passed and the reasons for it.

PART IV.

THE FOREST SERVICE.

CHAPTER XIX.

THE LEGAL ORGANIZATION OF THE FOREST SERVICE.

In the beginning of this book I described the reasons which led to the enactment of a special forest law. One of these reasons was the necessity for organizing a special *Forest Service*—a staff of officers who should not only be entrusted with the professional duty of managing and working the estates, but who should also be invested with certain legal powers for the protection of the forests, the prevention of offences, and the arrest of offenders.

In order to do this it is necessary that the law should recognize the legal existence of "Forest Officers" as such, and declare them to be "public servants," that they may be under a certain definite responsibility to the State while they are entrusted with certain powers on its behalf.

Consequently, in Chapter XII of the Indian Forest Act (Chapter X, Burma Act), all forest officers are declared to be "public servants" within the meaning of the Indian Penal Code, and they are thus subject to all the general provisions of the Code, imposing duties and liabilities on and extending a certain protection to public servants, of which I shall speak presently. The Forest Act also threatens them with special penalties in certain cases, and places them under certain restraints as regards their engaging in trade or other occupations likely to interfere with their public duty.

On the other hand, the law protects them from civil action, requires special sanction to their criminal prosecution, and arms them with powers so that they may be able to act efficiently in the discharge of their functions.

It will be convenient to consider the subject of this chapter under the following heads :—

Section I.—The general nature of public service;

Section II.—The appointment of forest officers and the organization of the Service;

Section III.—The special responsibilities of forest officers under the Forest and General law;

Section IV.—The special protection extended by law to forest officers;

Section V.—The legal powers of forest officers;

Section VI.—Offences against the lawful authority of forest officers as public servants.

SECTION I.—THE GENERAL NATURE OF PUBLIC SERVICE.

§ 1.—*Who appoints.*

In theory all public servants are appointed by the Crown; but usually the authority to appoint is delegated. The delegation appears in more or less general terms in Statutes or Acts. Sometimes the office is assumed to exist, and the law merely states who is to nominate persons to it, and under what conditions persons can be appointed[1]. Sometimes the office only is created, and the person to hold it is detailed by orders embodied in Departmental Codes or Circular Orders[2]. Very often an office may be created generally by name, and then several sets of powers become attached to it by express provision of different laws, for example a Deputy Commissioner in a Non-Regulation Province. There are laws which declare that such officers may be appointed generally. But the Deputy Commissioner has *executive* functions determined by Departmental Government Orders. He has *magisterial* functions under the Criminal Procedure Code, *Civil* powers under the Courts Act of his province and the Civil Procedure Code, *Revenue* powers and various powers connected with Stamps, Excise, Opium, &c., under the laws devoted to this subject. In India all appointments

[1] For example the Police Act V of 1861, which specifies the grades, who is to appoint them, what their duties are, and so forth.

[2] It is obvious that this is delegation. The Government of India, for example, make certain rules about appointments, which appear in a Departmental Code. This is expressly or impliedly sanctioned by the Secretary of State, who acts as the representative of the Crown.

not specifically provided for, either in the "Act for the better government of India (21-22, Vic. cap. 106) (A.D. 1858), or in some other Statute or Act, are covered by section 30 of the Act alluded to, which runs thus:—

"All appointments to offices, commands and employments in India, and all promotions which by law, or under any regulation, usage, or custom are now made by any authority in India, shall continue to be made in India by the like authority, and subject to the qualifications, conditions and restrictions now affecting such appointments respectively. But the Secretary of State for India in Council shall have the like power to make regulations for the division and distribution of patronage and power of nomination among the several authorities in India, and the like power of restoring[3] to their stations, offices or employments officers and servants suspended or removed by any authority in India, as might have been exercised by the said Court of Directors, &c., if this Act had not been passed."

§ 2.—*Appointment of Forest Officers.*

The powers and duties of forest officers are prescribed by law, as far as it is necessary for law to provide them: purely executive and administrative duties in the management of forests, the making of inspection tours, the method of working, the forms of account to be kept and of official returns to be made, can be prescribed by executive rule and do not require legislative interference[4].

The Forest Act, however, neither creates the different classes of forest officers recognized by their titles, nor says who is to fill these different offices. It takes for granted that certain authorities will have appointed "Forest Officers" in a known or customary order and gradation, and contents itself with assigning powers and duties either to all forest officers generally, or to *the* forest

[3] Hence the admission of appeals from orders dismissing, &c.

[4] For they do not affect the position or rights of third parties in any way, as is the case when the forest officer makes an *arrest*, or seizes timber.

officer who may be indicated, either by direct words of the Act, or by rules which the Act allows to be made.

The staff[5] which is to exercise the legal powers of forest officers is appointed under executive orders, which appear in the Departmental Code. In this case also it is clear that all the different appointing authorities are really exercising their powers by delegation from the Crown under the general powers given in the "Act for the better Government of India," already alluded to. The Conservator is empowered for example to appoint a Forester: but this power is delegated to him by the Governor General who has made the Code, who again derives his authority from the Crown, through the Secretary of State in Council.

§ 3.—*Duration of Service.*

As regards the *duration* of public service, this is sometimes fixed by law, sometimes by executive rule, which ultimately means the pleasure of the Government, and sometimes by contract.

For example the Judges of the superior Courts in England are by the Constitution appointed "*quam diu se bene gesserint*"—as long as they conduct themselves uprightly and properly, they cannot be removed at the mere will and pleasure of the Sovereign. But, as of course, the condition of "good conduct" is open to doubt, it is constitutionally held to mean that the Judge shall not be guilty of such misconduct as shall induce *both Houses of Parliament* to present an address to the throne praying for the Judge's removal.

Contract, of course, often plays an important part in the duration of service. Many officers are appointed on condition of entering into an express *covenant* with the Secretary of State or

[5] Conservators, Deputy Conservators and Assistant Conservators are appointed by the Government of India unless appointed in England by the Secretary of State. Sub-Assistant Conservators and Probationers for the grade are appointed by the Local Government or by the Government of India according to the legal nationality of the candidate. Conservators appoint Forest Rangers, who form the executive staff, and also Foresters and Forest Guards who form the protective staff. Guards also are usually nominated by the Divisional controlling officer.

other authority, which engages their services for a fixed time, or does so for an initial term of years, after which the covenantor becomes subject to certain departmental rules about continuing service up to a certain *age*, or for a certain term of years, after which retirement on pension is compulsory, and so forth.

Where there is no such agreement, appointments are always during the pleasure of Government. In the case of superior service, there are always departmental rules, which contain or imply specific terms regarding the duration of service; and in the case of all inferior appointments not so regulated, the service would be terminable by notice, or by payment of a month's or a quarter's or a year's salary (according to the usual terms), just as any private service might be.

§ 4.—*How Duties and Powers are fixed.*

As regards the *duties* of public servants and the *powers* which are given them that they may carry out their duty effectively, I have already observed that such duties are often, and powers always, prescribed and given by law. Powers that may affect the property or the liberty of third persons must always be given by public authority of the law. Duties which have a similar effect, either as regards the legal obligation of the officer himself, or on the position of third parties, should also be so prescribed; especially those duties, the neglect or misfeasance of which entail a criminal responsibility or liability to a civil suit for damages. But there are many other duties which merely affect the Government as employer and the public servant as the employed: there are also many terms and conditions of service which affect no one to any appreciable extent, besides these two parties. Such duties and conditions are usually not (though the Continental laws, as we shall see, do not always restrict themselves to the same limits) specified in any penal or even civil law, but are left to Departmental Code, Circular Orders, and other methods of conveying "Official Orders" with which every one is familiar. It is always held advisable by our Legislature never to make *special* provisions

of law, still less of law carrying a penalty of a criminal or *quasi* criminal character[6], where the matter can be adjusted on the ordinary principles of the general law of *contract*.

Consequently the forest officer will perceive that while some of his powers are given him by the Forest law and others by the General Criminal law, and while he is by law prohibited from doing certain things, and in a few cases threatened with criminal penalties, in the greater part of his official duty he is subject only to departmental or general official rules and obligations, which may entail fine, censure, or dismissal (according to his rank and circumstances), and which derive their force from the law of *contract*. Just as it was in the case of the duration of his service, so it is in these matters. If he is what is called a "Covenanted" officer, he will probably have put his name to express clauses binding him to obey the rules and orders of his service, heretofore made, or hereafter to be made, by competent authority. But even if he has not signed a covenant, he is nevertheless held, on obvious principles of general law, in accepting service with Government in any grade or rank, to enter into an *implied contract* to accept the remuneration, terms of service, rules of leave and pension, issued by authority, as well as to render obedience to superiors. He contracts to accept and abide by all service prohibitions and to fulfil all duties, as to inspection, work, keeping accounts, and all other matters whatsoever, which find place in the Codes and circular orders, or are within the power of his superior officers (according to the rules of service) to prescribe[7].

It may be that a difference, which at best is rather apparent than real, exists between private contracts of service and public. In private service the terms are expressed at the outset and cannot

[6] This will receive a general illustration when I come to speak of the special rules about appointment of forest officers and compare them with the Police Force.

[7] It will be observed therefore that the force of a Departmental Code, like that of the Forest Department, is not a "force of law" like the Forest Act or rules made under it; but its force is that it consists of rules of service which forest officers by their *contract* of service *are bound* to obey.

afterwards be varied without the consent of the employé. But with Government service it is understood that the welfare of the Department, and of the public generally, may demand that rules should be modified and new rules made, so that the service may be as efficient as possible, and the public advantage, in the proper conduct of public business, secured. But in the former case there *may be*, and in the latter there always *is*, an expressed or implied agreement to accept any alterations in terms that may be necessary. Such changes never of course amount to any absolute or legal injustice constituting a breach of contract (as *e.g.*, if Government were suddenly to require all its servants to work without salary).

And I may here add that Government always recognises the duty of making known, by the due publication of circulars, &c., any such terms of service, or alterations in them. I apprehend that a public servant would have a good case if he were dismissed for breach of a particular rule, and he could show that he was unaware, and had no means of becoming aware, of the rule.

SECTION II.—THE APPOINTMENT OF FOREST OFFICERS AND ORGANIZATION OF THE SERVICE.

§ 1.—*The Forest Acts.*

In the Indian Forest Act, as I said before, no titles or grades of forest officers are specifically provided. The different official designations, and the gradations of rank and pay, the age and qualifications of nominees, and so forth, are executive matters and are prescribed by authority of Government in the Forest Department Code[8]. The Act only speaks of "Forest Officers" generally, and this term is defined to include any person (by whatsoever designa-

[8] By the French Law, and some of the German Laws, many of these matters are prescribed by law. In France, for example, the age at which a person can be appointed to a forest executive office is fixed by law at 25 years, with a power to Government to grant dispensation in certain cases.

tion called) whom the Governor-General in Council[9] or the Local Government (or any officers to whom the power of appointment is delegated by either) appoints by name or '*ex-officio*' to do anything required to be done by the Act, or rules made under it, by a forest officer.

This might at first sight give rise to a doubt, because the authorities mentioned do not, in fact, appoint forest officers in this way. A gazette or other order of appointment merely states that so and so is appointed to be a Conservator, a Deputy Conservator, an Assistant Conservator, or Sub-Assistant Conservator of Forests, or Forest Ranger, a Forester, or a Forest Guard; and is posted to such a province or forest division in the province.

This difficulty is got over by making rules under section 75 of the Act. Such rules can set forth that all the officers now appointed, or hereafter to be appointed, with these titles, are forest officers under the Act, and there the duties and powers of the different grades are specified[10].

The Burma Act has avoided all difficulty of this kind by declaring that "Forest Officer" means all persons appointed (by the authorities stated) to be Conservators, Deputy Conservators, Assistant Conservators, &c., &c., or to discharge any function of a forest officer under the Act or rules. (This latter addition includes the case of civil officers appointed to do certain acts in places where a regular forest staff has not yet been constituted.) In

[9] Officers appointed at home by the Secretary of State are nevertheless formally appointed Assistant Conservators, &c., by the Governor-General in Council, on arrival in India.

[10] As an example of how this is done I give the rules issued under section 75 (on this subject) by the Panjab Government, as follows:—

No. 533F.—*Notification.*—The Lieutenant-Governor is pleased, under section 75 of Act VII of 1878 (The Indian Forest Act), to prescribe and limit the duties of Forest Officers * * * * * * * * * by the following rules:—

(1) The Conservator of Forests, all Deputy Conservators, Assistant Conservators, Sub-Assistant Conservators, Forest Rangers, Foresters, and Forest Guards are appointed to do all acts, and exercise all powers that are prescribed by the Act, or by Rules made under it, to be done by a forest officer or by any forest officer.

(2) The forest officers mentioned in the first column of the following schedule

consequence of this definition, the Act throughout prescribes everything to be done, either by "a" or "any" forest officer, or by "a forest officer specially empowered." All that is necessary is that the Local Government should notify what individual officers or classes of officers may act under the different sections; the officers so specified are those "specially empowered" as regards those sections.

shall exercise the powers under the sections of the Act mentioned in the second column of the same opposite each class of officers respectively:—

Class of Officers empowered.	Section of the Act under which powers are given.	Brief description of nature of powers conferred.
I.—All Deputy Conservators, Assistant Conservators and Sub-Assistant Conservators, when in charge of Forest Divisions.	20	To publish translation of notifications reserved forests.
	25	To notify seasons during which the kindling, &c., of fire is not prohibited.
	45	To notify depôts for drift timber, &c.
	46	To issue notice to claimants of drift timber, &c.
	47	To decide claims to drift timber, &c.
	50	To receive payments on account of drift timber, &c.
	60	To direct release of property seized.
	82	To take possession of and sell forest produce for Government dues.
II.—All Deputy Conservators, Assistant Conservators and Sub-Assistant Conservators, Forest Rangers, and Foresters when specially authorized in that behalf by the Conservator of Forests.	25	To permit acts otherwise prohibited in reserved forests.
	33	To permit acts otherwise prohibited in protected forests.

(3) Conservators of Forests are empowered to exercise all or any of the powers conferred in the foregoing schedule.

(4) Conservators of Forests are empowered, under section 24 of the Act, with the previous sanction of the Commissioner of the Division, to stop ways and water-courses in reserved forests, subject to the provisions of that section.

§ 2.—*No provision for Enrolment.*

There is no special process of *enrolment* even for the "rank and file" or the protective staff of the forest service. In the case of the Police force, for example, each officer is furnished with a formal certificate of service, and then the law provides that he is vested with the powers, functions and privileges of a Police officer. The Inspector-General of Police can make rules under the Act regarding equipment and organization. By law, Police officers are bound not to be absent without leave, not to resign without giving two months' notice, not to trade, not to break rules wilfully, nor to exhibit cowardice, nor offer personal violence to persons in their custody; and a breach of any of these rules gives rise to a fine or loss of pay, and also to a criminal penalty of three months' imprisonment and fine[1].

There is however, as a matter of principle, a dislike to invoke the aid of criminal law and penalties whenever contract obligations may possibly suffice, and therefore these legal provisions have not been enacted in the case of forest officers. It might, therefore, happen that a forest officer, suspended for misconduct, might defy his superiors, by giving a month's notice (as the service is on monthly salary) to quit, or might leave without notice (forfeiting his right to pay), and he could do so with impunity, the only remedy being an action for damages. But this and other acts of misfeasance may be guarded against by making it a condition of appointment that the nominee should furnish *security*, of one or more solvent and respectable persons, for his good conduct and obedience to rules[2].

[1] See Act V of 1861 (Police Act), sections 7, 8, 9, 10 and 29.

[2] This condition Government has an obvious right to insist on before giving an appointment; but the matter has not yet, as far as I am aware, been the subject of any official orders. I would remark that security should be always either by deposit of cash (in Government Savings Bank so as to bear interest) or of Government securities, or be the personal security of persons, as stated in the text. The hypothecation of land or houses is very unsatisfactory, as there is always difficulty about realization even if the value is not doubtful.

§ 3.—*Punishment, Suspension and Dismissal.*

The question, therefore, of *gsuspendin* a forest officer, *fining* him for neglect, or *dismissing* him for misconduct, depend on his contract obligation (implied, or expressed in a covenant) to obey the rules of his service; and these rules are very clearly laid down in the Departmental Code[3]. In only one case does the Forest law itself make mention of one subject of service discipline. The Departmental Code prohibits a forest officer being concerned in any forest lease or working, all trading, holding of land, &c. (chapter I,

[3] In many of the continental laws these matters are minutely regulated by law. As a remarkable example, I may allude to the law of public service (*Staatsdienergesetz*) of Saxony (7th March 1835). Here various grades of punishment are contemplated—(1) actual dismissal, (2) suspension for a time, (3) official reprimand with or without fine up to 50 thalers in case of a superior, or being put under arrest for a term not exceeding eight days in that of an inferior officer.

Actual dismissal is lawful—

(*a*) On conviction of certain offences (specified in the law), or any offence punishable with imprisonment for more than six months, or when the public servant has been *accused* of such offence but has been *acquitted* in an *unsatisfactory way* (details are given, but would not be intelligible to the English student).

(*b*) And so in cases of offences which are such that public respect and confidence must be withdrawn from a public servant guilty of them.

(*c*) In certain acts expressly threatened with dismissal in the "*Dienst Instruction*" or standing orders of service handed over to the official on receiving his appointment.

(*d*) On becoming bankrupt.

* * * * * * *

In all cases of notice of dismissal an opportunity of making a defence is to be given.

The lesser punishments indicated above may be inflicted according to circumstances.

First the reprimand is tried, then the suspension, which in itself operates as a 'second reprimand;' and after the second reprimand a repetition of the offence entails dismissal. Offences so dealt with are—

(*a*) The officer has been punished with imprisonment for lesser crimes than those above stated;

(*b*) Is habitually addicted to immoral conduct;

(*c*) Lowers himself in the public estimation, especially by habitually consorting with low characters or loose women, habitual drunkenness, reckless getting into debt, gambling, making use of his official position for his own unlawful benefit, habitual ill-temper and unaccommodating disposition in his official relations;

section 1, para. 11); and the Act itself has prohibited, and therefore rendered penal, the breach of such a rule, as far as any trading in timber and leasing or working a forest is concerned.

The Departmental Code also governs reduction in rank (sections 36-7). Such dismissal in the superior grades and in the inferior is similarly provided for in section 46. Subordinate officers are also liable to fine under section 47.

§ 4.—*Duties of Forest Officers.*

So also the Code lays down the departmental duties of forest officers.

The intention is gradually to divide the service into distinct classes, the lower being purely *protective;* the next *executive,* carrying out surveys, demarcation, planting, fencing, felling, thinning, and all other works; and the highest being the *controlling staff*, the duty being to give instructions as to what work is to be done and how, and to see by constant *inspection* that it is going on properly, and that all grades do their duty effectively.

At present, the state of affairs does not admit of this division being completely carried out[4], as the executive and controlling branches are not yet completely separated.

(*d*) Improper disclosure of official matters;
(*e*) Habitual disposition to revile publicly the internal rules and regulations of the State and its officials;
(*f*) Harsh and degrading treatment of subordinates or of private persons in his official relations with them, or arbitrary and capricious conduct towards inferiors;
(*g*) Connivance with inferiors in the irregular or unfaithful discharge of their duty;
(*h*) Neglect to give proper supervision and attention to subordinates.

[4] The French organization draws a distinction between forest officers as "*préposé*" and as "*agent.*" The former includes what we should call the protective staff only, the latter the controlling and executive. The former are the *gardes* of cantons or beats and the "*brigadiers*;" the latter are the "Conservateurs," "Inspecteurs, and Sous Inspecteurs and Gardes Généraux." The former only have the power of arrest; they make the formal statement (*constatation*) of forest offences; and if the latter do the same to a certain extent, it is only as secondary duty to enable them to fulfil their primary duty. The Guards make the official report and "*constatation,*" the "agents" carry the prosecution to Court (Code F., 171-4) Manuel de Legis-

In India forest officers have to receive revenue paid into their hands, and consequently to keep accounts of this as part of their receipts, along with the funds they are entrusted with to pay for work done and materials supplied, &c.

§ 5.—*Oath of Service.*

In India no oath or solemn affirmation on taking service, is required by law or by rules of service.

It is not thought necessary. A good man will do his duty without such a formality; a bad man will hardly be much influenced by it. In either case the general law and the responsibility under contract of service are better guarantees for effective service than oath[5].

On the other hand, the Police law might well be imitated in giving a *formal certificate,* the retention of which after dismissal should be made penal; and above all the Saxon plan of giving a "*dienst instruction,*" or printed form, showing briefly the main heads of service obligation, and the acts which entail dismissal, is worthy of adoption in India.

§ 6.—*Uniform.*

At present also no standard or official orders have been issued about uniform, but as the service develops this will be necessary.

lation Forestière. A. Puton, Paris 1876, pages 50 and 113). In France forest officers have nothing to do with realizing revenue or with civil suits, nor can they represent the State in any question of proprietary right, exchange, and grant of rights, &c. (*Op. cit.*, pp. 57-8 and 93-4).

[5] This view is not taken on the Continent. The laws always (as far as I am aware) require an oath of service. (See for example Code For., Art. 5). Similar importance is attached to uniform as indicating to the public the service and rank of the wearer. (See Art. 34, Ord. Regl., which requires forest officers on duty to be in uniform.) When the forest officer draws up his *procès verbal,* a document of which I shall speak hereafter, stating the facts of forest cases which have come under his official notice, the form always states that at the time he had duly taken the oath of service and was clothed with the distinctive marks of office (*assermentés et revêtus des marques distinctives de nos fonctions*), see Code For., Art. 160, and the forms given in the Guide Forestier. So under the Prussian law (see Eding, p. 182), the forest officer is justified in using his weapons in special circumstances, but he *must be in uniform* or with a badge of authority (*in Uniform oder mit einem amtlichen Abzeichen versehen*).

Because it is important that persons who may be warned, prevented from doing certain acts, and even arrested, by a forest officer, should be able to know by his dress and badges, who he is and what *primâ facie* is his official position. As a matter of practice, the superior staff wear nothing in the way of uniform or distinctive mark, and the subordinate staff wear a sort of uniform, but not the same in all provinces, or even in all divisions of one province, and are furnished with a badge. It is desirable that this should be put on a proper footing, because, under section 171 of the Penal Code, it is a criminal offence for a person not belonging to a certain class of public servants to "wear any garb or carry any token" resembling any garb or token used by that class of public servants. It is true that there is nothing said about the "token" (it may be a "chaprás" or badge or a truncheon or a weapon of pattern) or the uniform being prescribed by rule of any kind; it is merely that such garb is, as a fact, usually worn by the class of public servant in question. Still the official regulation of these matters is desirable and would prevent questions arising[6].

SECTION III.—THE SPECIAL OBLIGATIONS OF FOREST OFFICERS UNDER THE FOREST AND GENERAL LAW.

§ 1.—*Not to trade.*

In order that the undivided time and attention of forest officers may be given to their duties, as well as to keep them free, in the general estimation, from suspicion of any interest in work going on, it is prescribed by law (Indian Act, section 74; Burma, section, 73) that, except with the written permission of the Local Government, no forest officer "shall, as principal or agent, trade in timber or forest produce or be [7] or become interested in any lease of

[6] In France the uniform and accoutrements of all grades are laid down in the Ordonnance Réglementaire, Art. 18, and the decree of 17th November 1852 (see page 103 of the pocket edition of the Forest Codes). See also the preceding note regarding the oath of service.

[7] So that if before the Act came into force he held any such contract he must at once get free of it.

any forest, or in any contract for working any forest, whether in British or foreign territory."

There is also a prohibition in section 11 of the Departmental Code, which, being obligatory on the service (as I have explained) by contract, also places him under a *legal obligation*. This paragraph runs as follows:—

"Except with the permission in writing of the Local Government no forest officer shall acquire or continue to hold cultivated land, or land intended to be cultivated, or forest land, in any province to which he is temporarily or permanently posted, or with the administration of which he is concerned.

"In the case of forest officers who are natives of India, and who may possess or acquire landed property, ancestral or other, it will be sufficient that a detailed report of the situation, nature, and extent of such property be furnished to the Conservator of Forests, who will, under the control of the Local Government, pass such orders as may be necessary.

* * * * *[8]

"Unless specially authorized by the Local Government, forest officers must abstain from any investment (though of itself unobjectionable), which interests them privately in affairs or undertakings of the kind with which their public duty is connected.

"And generally it is a rule of service that no forest officer is permitted to engage in any speculation or mercantile transaction of such a nature as to engross his attention and divert it from his public duty, or such as to give rise to a belief that his official position may have had influence by obtaining favourable terms or otherwise in respect of such transactions.

"The above provisions apply to officers of the superior staff, as well as to forest-rangers, foresters, forest guards, and members of office establishments."

An offence against either the section of the Forest Act or the

[8] The lines omitted repeat *verbatim* section 74 of the India Forest Act, already quoted.

service rule in the Code[9] would be punishable under section 168 of the Indian Penal Code[10].

§ 2.—*Vexatious use of lawful Powers.*

The Forest Act provides a penalty against Police or forest officers who "vexatiously *and* unnecessarily" seize any property under colour of seizing property liable to confiscation under the Act (Indian Act, section 61; Burma Act, section 61)[1].

§ 3.—*Other Obligations.*

But besides these, the general law under the Indian Penal Code lays certain obligations on all public servants: and forest officers, no less than others, would be liable to prosecution, as such public servants, for breach of the provisions.

I shall here only allude to such sections as it is possible, in practice, to require reference to in the Forest service.

[9] With reference to the definition of the terms "illegal"—"legally bound" in the Penal Code, the term "legally bound" is applicable to everything (*a*) which is an offence, or (*b*) is prohibited by law, or (*c*) *which furnishes a ground for civil action.* Any breach of a service rule or obligation would at least come under the last of these.

Section 169 also punishes the bidding at an auction by a public servant who is bound not to bid.

[10] In France (Code F., Art. 4) the forest officer's employment is declared incompatible with any other office; and the Ordonnance also adds other occupations that he may not engage in, for instance he must not trade in wood, or have any trade in which wood is the principal material employed. Nor must he keep an inn or sell drink. By Code F., Art 21, he is barred (and certain of his near relations also) from bidding directly or indirectly, or taking part in purchases of forest produce put up to auction. The "adjudication" of sale would be void and a heavy penalty due besides.

By the Saxon law (that alluded to in a previous note), the public servant must not engage in any trade or profession (*Erwerbzweig*), nor in any occupation compatible with the dignity (*würde*) of his office, or that would conflict with his public duty.

[1] As M. Puton neatly expresses it, these legal provisions are the counterpoise to the legal authority given to forest officers. "*La possibilité d'une peine est le contrepoids de l'autorité qui leur est confiée*" But as M. Puton adds, in France, and I hope it is true also in India, no case has yet come up in which these penalties have had to be inflicted, and they might well be dispensed with, seeing the sufficiency of the service rules for control and punishment (Manuel, p. 48).

4.—*Public Servant concealing design to commit, or abetting an Offence.*

A forest officer concealing, by any act or illegal omission, a design to commit an offence which it is his duty to prevent, or making a false representation regarding such design, would be punishable under section 119, Indian Penal Code[2].

Should he go further and actually aid in or *abet* the offence, he would be liable, under section 116, to *double* the penalty a private person would.

§ 5.—*Bribery.*

The offence of bribery, or as it is technically called (receiving an illegal gratification)[3], is also one which needs mention.

The principal section (Indian Penal Code, 161) may be exhibited analytically, thus:—

{ A public servant, or
{ A person *expecting to be* a public servant.

Who—

{ Accepts [when offered *without* overture on his part],
{ Obtains [when *there is* an overture on his part],
{ Agrees to accept [has an understanding with the offerer],
{ Attempts to obtain [solicits for example, or hints that he would like].

[2] This does not of course deal with cases of negligence, or mere carelessness in execution of duty. But a forest guard who allows cattle to trespass in a closed forest, or other offences to happen, should be held responsible as a matter of service obligation.

In the French Code (Art. 6), there is an excellent provision that guards are (pecuniarily) responsible for forest offences that occur in their beat (*délits, degâts, abus, et abroutissements,*" offences, injuries, and browsing by cattle). They are liable to pay the fines and damages that the delinquent would have incurred, unless they have properly done their duty in discovering the offender and making the necessary report of the offence.

In India, when a forest officer allows trespass and so forth by negligence or inattention to his duty, the remedy is to reprimand, fine, or even dismiss him (in grave cases) departmentally.

[3] Gratification need not be money (*Explan.* to Section 161). "Legal remuneration" is not confined to Government pay, but is anything which "he is permitted by the Government he serves to accept."

From any person, for himself *or for any other person* any gratification *other* than his lawful remuneration, as a *motive* or *reward*[4] for—

{ Doing any official act
{ Forbearing to do any official act,

{ Showing { favour } in exercise of official functions,
{ Forbearing to show { disfavour }

{ Rendering } Service } with Government[5] or any public servant.
{ Attempting to render } Dis-service }

is liable to imprisonment which may extend to three years or to fine, or both.

The person who gives or offers, &c., the bribe is liable as an abettor.

Nor is it only this more direct form of bribery that is punishable. A public servant who obtains any *valuable thing* (*e.g.*, a house, a lease of a house, a loan of money on easy terms) either without any equivalent or 'consideration,' or for a consideration which he knows to be inadequate, from any person whom he knows to *have been*, to *be*, or *to be likely to be* connected, *in any way* with his own official business *or that of his superior* officer, or even from a person, who is *interested in* or *related to* a person so connected, is liable under section 165, Indian Penal Code.

So also a person may not venture to offer a gratification[6] to a public servant directly, but he may offer it to a *third* person, who

[4] *Motive* before the act, *reward* after it. It is wholly immaterial whether he really did the thing or intended to do it; it is no excuse to say "I took bribe as a *motive to do* the thing, but all the while I never intended to do it;" nor "I took the *reward* as for a thing done, but I have not really done it." [*Explan.* to Section.]

[5] "Government" here means the Government of India, or any Local Government either in executive or legislative branches.

[6] In order that public servants may remain not only free from temptation to actual offences but free from suspicion of being influenced, there are various rules about their not accepting gifts at any time. By law (13, George III, c. 63, sections 23-5, (and 33, George III, c. 52, section 62 also), the receiving of gifts from any of the Indian Princes or any "Native of Asia" by any person holding office under the Crown or the East India Company is forbidden and is punishable; but this does not apply to fees taken by lawyers, physicians, chaplains, &c.

undertakes to *induce* by *corrupt* or illegal *means* (section 162), or to use his *personal influence* with and so induce (section 163) the public servant, so that he may do or not do something, or show favour or disfavour in his official dealings. This is punishable. In these cases the public servant may of course be entirely ignorant of the acts of the others; but should he abet them, he becomes liable to a severer punishment under section 164 than could be given under section 162 or 163. The illustration given explains this. A is a public servant, B is his wife. C comes to B and begs her to use influence with A to get an appointment for C himself, or some other, and gives her a gold bracelet. Here B would be liable under section 163 to one year's imprisonment, but if A knows of it and abets her, he would be liable, under section 164, to three years' imprisonment.

It is necessary that these stringent provisions should exist, but, on the other hand, the very stringency of them makes it possible for persons from motives of revenge, or to annoy a public servant, whose duty, however faithfully discharged, may be obnoxious to them, to get up false and vexatious charges of such offences.

If then a prosecution is undertaken against a public servant, *as such*, there are certain preliminary sanctions necessary which will be alluded to in their proper place.

§ 5.—*Misuse of Official Power.*

There are also some provisions of the Indian Penal Code which are in their nature to be classed with section 61 of the Forest Act, to which I have already alluded. They refer to cases where the *authority* or *power* of a public servant is *misused* with intent to injure.

It is difficult sometimes, without giving great offence, to refuse a present, but a public officer should endeavour to explain the matter with courtesy and so avoid the gift. If it is on some formal ceremony or official occasion, where the gift cannot be refused, it is accepted and afterwards handed over to the Government "*toshakhána.*"

Only presents of absolutely no value, that are mere compliments, and that it would give offence to refuse, such as flowers or fruits, can be received, and this should be discouraged, and eventually dropped.

In France, Art. 55 of the Ordonnance Regulation *absolutely* prohibits the receiving of gifts.

In these cases no bribe may be offered, but the public servant is actuated by a desire to injure or annoy some person obnoxious to him.

A public servant disobeying any direction of the law as to the way in which he is to conduct himself, is liable under section 166, Indian Penal Code.

If it be his duty to draw up or translate some official document, and he intentionally does it wrong, to injure some one[7], or knowing that injury will be likely, he is liable under section 167, Indian Penal Code.

§ 6.—*Offences to screen Offenders.*

An offence similar to that in section 166, if done in order to save a person from legal punishment or diminish that punishment, or to save property from legal forfeiture or other charge, is contemplated by section 217; and so an offence similar to that in section 167, done with this object, is punishable under section 218.

As a forest officer is required to prevent offences, and has a power of arrest, it is possible that cases under section 221 may occur, in which an offence may be committed by a forest officer intentionally omitting to apprehend an offender or intentionally suffers or aids his escape[8].

§ 7.—*Breach of trust.*

Lastly there may be special forms of the offence of criminal breach of trust[9], when it is committed by a public servant. (Indian Penal Code, Section 409.) All these are offences in which, to make the sections quoted applicable, the offender must be a public servant.

§ 8.—*Liabilities indirectly connected with Forest Works.*

There are, of course, many offences which may be committed

[7] That is quite another thing to forgery or falsifying accounts, &c. These are punishable under other sections for forgery, cheating, &c.

[8] And the person in this case to be arrested, &c., may be guilty of a *forest* offence, for the term "offences" in section 221 includes offences under special laws. (Section 4 O. T. P. C.)

[9] The difference between theft, criminal misappropriation and criminal breach of trust has been explained in the chapter on Offences. See *ante*, p. 314.

irrespective of public duty, but which nevertheless may possibly occur in connection with the public duty of forest officers, clerks, &c., such as making false entries in books and fabricating false evidence. (Sections 192-3, Indian Penal Code).

Signing or issuing a false certificate (section 197), making a false statement in a declaration receivable as evidence (section 199), causing disappearance of evidence to screen an offender (section 201), making a false charge with intent to injure (section 211), making a false document (section 464,) and kindred offences. These, however, will need no special explanation.

§ 9.—*Offences not actually criminal.*

The liability of forest officers for breaches of duty not amounting to any criminal offence, such as negligence, insubordination, drunkenness, or immorality interfering with his public duty or character as a public servant, is, as I have said, dependent on departmental rules; fine or dismissal are the appropriate remedies according to the rank of the offender, under the appropriate clauses of the Departmental Code.

§ 10.—*Suspension during Enquiry.*

In cases where a forest officer is charged with misconduct, or is under a criminal charge as a private person (which charge is disgraceful to him as a public servant, and conviction of which would render him unfit to be retained in the service), he should be *suspended* from his duty during the enquiry. Whether he is reinstated and allowed his pay for the time he has been suspended, depends on the result of the case, and the view taken of the officer's conduct by the authorities[10]. In ordinary cases the head of the department causes an enquiry to be made, and sends the case up for orders, if he cannot, under departmental rules, dispose of it himself. In all cases, the charge, the defence, and the order passed, should be in writing. As regards defence, it is important (even if, in the course of enquiry, the suspended officer has *practically* been heard, and his excuse is

[10] See Government of India Resolution, Home Department, No. 37, 29th July 1879. This Resolution also acknowledges the right of a person dismissed, &c., to appeal.

known) still to give him a formal opportunity for submitting a full written defence, taking care that he is furnished with the necessary copies, extracts, &c., to enable him to know all that is charged against him, and reply to all the evidence[1].

In cases of officers not removable without sanction of Government[2], and when any formal enquiry or departmental investigation is needed, there is a special Act (XXXVIII of 1850), authorising Government to appoint a Commission or to direct the Court or Board to which such officer is subordinate to hold a "formal and public" enquiry. Articles of charge are to be drawn up, evidence is to be heard, and in fact the whole enquiry is conducted much like a trial in Court. This Act is very rarely had recourse to and this brief notice of it will be sufficient.

SECTION IV.—THE PROTECTION EXTENDED BY LAW TO FOREST OFFICERS.

§ 1.—*Civil Suit will not lie.*

In the preceding section we considered the obligations forest officers were under, and the great care necessary on their part to avoid every suspicion that might arise from their being concerned in trading transactions, or from their receiving gifts of any kind in their official character. But the very existence of the necessary legal provisions in these matters, may also render forest officers (and public servants generally) peculiarly liable to unjust comment, and even to malicious accusation, since those officers have often to discharge a duty which is displeasing to individuals or curtails their

[1] Rules about suspension, subsistence allowance during it, and the ultimate grant or refusal of the pay accruing during the term of such suspension, according to the result of the enquiry, are to be found in the note to section 54 of the Civil Pension Code. The Forest Code mentions the suspension of the subordinate staff (Forest Rangers and downwards) by the divisional officers, pending Conservator's orders. (Section 46.)

[2] The Act only alludes to officers in the service of Government not removable without the sanction of Government, and 'Government' is defined in the Act to mean the Governor-General in Council, and the Governors and Lieutenant-Governors of Provinces.

liberty, and so may give rise to feelings of enmity and an unworthy desire of revenge.

Forest officers, therefore, are protected by law, both as regards civil suits and criminal prosecutions.

In the first, by section 73 of the Indian Act, no civil suit will lie against any public servant for anything done by him in good faith under the Act[3]. Nor can a forest officer be held liable for loss of timber taken charge of under section 45 of the Act, or stored at a depôt under section 41; unless, of course, there is fraud and malice[4]. (*See* Sections 43 and 49 and Burma, section 79.)

[3] Or under Rules made under it; though this is not stated, it would, I think without doubt, be so decided. (See Burma Act, section 72). A similar provision ought to be added to the Forest Regulations of Hazara and Ajmer and to the Berar Rules.

[4] See also under the head of Agency in the Chapter on Contract Law. It may be useful here to refer to the English Law, as explained in Broom's Constitutional Law (Edn. 1866, pages 618-9). The author says that an action will not lie against a public agent for anything done by him in his public character or employment, though alleged to be, in the particular instance, a breach of such employment and constituting a particular and personal liability. And no such person is understood personally to contract.

On principles of public policy an action will not lie against a person acting in a public character and situation which from its very nature might expose him to an infinite multiplicity of actions, at the instance of any person who might suppose himself aggrieved. The very liability to such suits would in all probability prevent any prudent person from accepting any public situation at such hazard or peril to himself.

But he might be liable for an act or tort, wrongful in itself and injurious to another. If such an act was done under orders, or in the belief that it was authorized and lawful, the principle was laid down in the case *Rogers* versus *Dutt*, quoted by the author I am alluding to. "But let us assume," said the Court in that case, "that the particular act complained of is to be viewed as the act of Government, and that in the part which the defendant (the public servant) took, he acted merely as the officer of Government, intending to discharge his duty as a public servant in perfect good faith and without malice, general or particular, against the plaintiff. Even on this assumption, if the act complained of was wrongful as against plaintiff and produced damage to him, he (the plaintiff) must have the same remedy by action against the doer, whether the act was his own, spontaneous and unauthorized, or whether it was done by order of the superior power. The civil irresponsibility of the supreme power for tortious acts could not be theoretically maintained with any show of justice if its agents were not personally responsible for them: in such cases the Government is morally bound to indemnify its agent * * *, but

§ 2.—*Criminal Prosecution.*

The Burma Act, besides mentioning civil suits, also specifically mentions a criminal prosecution which the Indian Act does not. But the same result is practically attained by the provisions of the General Criminal Law (Indian Penal Code), which declares in section 79 that nothing is an offence which is done by a person who is justified by law in doing it, or who, by reason of a mistake of *fact* (not a mistake of *law*), in good faith believes himself to be justified in doing it.

I may here mention that a subordinate officer, if ordered by his superior to do an act which was criminal or clearly illegal, would not be justified in doing it. The circumstances might be such as could make it only just for the Government to exercise its prerogative of pardon, but, as a matter of law, a conviction would be good. Even the orders of Government would not be a protection, unless the circumstances were such that the whole transaction was "an act of State" (as for example during war, &c.) and beyond the cognizance of the Courts[5].

§ 3.—*Sanction for Prosecution in certain cases.*

But even supposing a public servant has actually committed an offence, taken a bribe, or what not, *as such* public servant, it is not lawful for every one to institute a prosecution as he might against a private person.

A public servant of such a rank that he is not removable from his office without the sanction of Government (which is a matter either determined by some Act, or by departmental rules),

the right to compensation to the party injured is paramount to this consideration, that is to say, special circumstances may render even a public servant personally responsible for acts *bonâ fide* done by him on behalf of the public, which in the contemplation of the law injuriously affects another." (*Op. cit.*, pp. 619-20.)

The head of the department cannot be made liable for the remissness of his subordinates (Broom, p. 244).

[5] For further particulars see note in Mayne's Penal Code (9th Edn.), page 55, and Broom's Constitutional Law (Edn. of 1866), page 621.

can only be prosecuted for an offence[6] committed by him *in his capacity* of public servant, "with the sanction or under the direction of the Government having power to order his removal or of some officer empowered on this behalf by such Government or of some * * authority to which such public servant is subordinate, and whose power to give such sanction has not been limited by such Government[7], and the section goes on to say that no such public servant shall be prosecuted for any act *purporting to be done by him in the discharge of his duty*, unless with the sanction of *Government*.

It will be observed that this protection is given to the superior orders of public servants. Those removable by any authority other than Government itself (and not by judicial officers) may be prosecuted without sanction[8].

It will also be observed that this sanction only refers to cases where the public servant is accused *as such*: thus, if a forest officer were to commit a theft, he could be prosecuted like any one else, for the offence has nothing to do with his being a public servant; but if, as a Forest Ranger, he took a bribe to allow cattle to graze (for example), here his being a public servant is the essence of the offence: so if he forged a public document, but not if he forged a bond or a relation's will, which had only reference to his private personality.

It may always happen that a forest officer, prosecuted and convicted of an offence as a private individual, might be so affected in character and in public estimation by the result that he would be unfit for retention in the public service, and so the fact of his

[6] An offence against the Indian Penal Code *or any* other law: "offence" has not the restricted meaning in the Criminal Procedure Code as it has in the Indian Penal Code.

[7] Criminal Procedure Code, section 193: the words omitted refer to Courts and Judges and do not affect the point we are considering.

[8] Though such persons may be prosecuted by private parties without any sanction; if it is intended to prosecute them departmentally, there may be service rules regarding a report to be made to the Conservator of Forests. (See Forest Department Code, para. 46.)

prosecution would come under official cognizance: but that is obviously a different matter, and has nothing to do with the prosecution itself[9].

SECTION V.—THE LEGAL POWERS OF FOREST OFFICERS.

§ 1.—*Power of Arrest.*

By the Indian Forest Act (section 63) any Forest Officer (or Police officer) may without orders from a Magistrate, and without a warrant, "arrest any person against whom a reasonable suspicion exists of his having been concerned (*i.e.*, as a principal or abettor) in any forest offence, provided that the offence was punishable with at least one month's imprisonment. This power does not extend to offences against rules made for the management of "Protected" areas except in the case of offences against a prohibition notified under section 29.

There must be no "unnecessary" delay in sending the person arrested before a Magistrate having jurisdiction.

The Burma Act. (section 63) has somewhat restricted this power. Here the arrest can only take place if the offender refuses to give his name and residence, or gives one that is false, or if there is reason to believe that he will abscond.

§ 2.—*Power to seize Property.*

Forest officers are (under both Indian and Burma Acts) entitled to seize all forest produce in respect of which there is reason to believe a forest offence has been committed, as well as all cattle, tools, boats, carts, &c., used in committing it. (Section 52.) This subject has been dealt with in the chapter on Forest Protection, so that further notice is not here needed.

[9] The Continental law usually contains provisions requiring sanction before prosecuting a forest officer. In France, for example, forest officers can only be prosecuted for acts done in their public character (*faits relatifs à leurs fonctions*) with previous sanction. (*Curasson*, I., page 123.) This sanction is prescribed in detail by the Ordonnance Réglem, Art. 39. A Garde Général requires the Director-General's sanction, for an Inspector the sanction of the Minister of Finance, and for a Conservator that of the Conseil d' État.

A mark has to be put on the property seized, and a report made at once to the Magistrate having jurisdiction: where property is seized and no offender is found, then a report to the seizing officer's superior is alone necessary [10].

§ 3.—*Power to interpose and prevent Offences.*

Forest officers (and Police officers) are bound to prevent, and may interpose for the purpose of preventing, forest offences[1]. This would naturally include the right of warning people, and of taking cognizance of persons wandering about in the forest armed with axes, saws, &c., although this latter is not (as in the French law) in itself an offence.

Forest officers, properly empowered, are also entitled to guard against fire, by notifying certain seasons *during which only* the carrying of fire in reserved forests is permitted. (See section on Forest Fires).

§ 4.—*Power to demand Aid from certain Persons.*

This is the place to mention that in certain cases forest officers are empowered to demand aid in the execution of their functions.

At a timber station or depôt, all servants, whether Government or private, employed at such stations, may be called upon to aid in case there is danger to the property stored there, in any emergency (such as cases of flood or fire). (Indian Forest Act, section 44—Burma, section 45.)

Forest officers may also demand aid in extinguishing forest fires, in preventing offences, and in discovering and arresting

[10] The French law also recognizes a similar "*saisie*," and there is also the "*séquestre*" (Puton, 135). The *saisie* simply leaves the property where it is but makes it inalienable—no attempt to do anything with it has any legal effect—it is "*frappé d'indisponibilité*." Cattle can be seized, and stolen wood (C. F., 161, also C. F., 81, 84, 146, 152). *Séquestre* is when the property needs to be moved and taken care of and deposited with someone (Puton, 140); the cases in which this process is adopted are expressly defined by the law; and it is not made use of in other cases.

[1] Indian Act, section 64 (Burma Act, *id.*). The French Code (Art. 163) gives power to arrest persons only when caught in the act of committing a forest offence. This applies to guards, &c. (*préposés* not *agents*, see Puton, page 114; see also page 145).

offenders, under section 78 of the Act—Burma, section 76. In this case the persons liable to give such aid are—

(*a*) Rightholders ;

(*b*) Persons holding permission to take produce or to graze cattle ;

(*c*) the servants and employés of (*a*) and (*b*) ;

(*d*) every person employed by Government or remunerated by Government for services in any village contiguous to the forest ;

and these persons are also bound to give information of offences that may come to their knowledge. (See page 322.)

§ 5.—*Aid by the Police.*

Nothing is said in the Forest Act of forest officers having a right to demand the aid of the public force (Police) in searching for stolen property, or in preventing offences, or arresting offenders, or in cases of fire. But as in such cases the Police are empowered to act, it is presumed that they would be bound to give aid to forest officers acting in the same way[2]. And of course a forest officer can call on any other forest officer to help him.

Under the Criminal Procedure Code, if it was a case of offence of the graver kind (*e.g.*, theft) cognizable by the Police, the Police would be bound to take up the case on the information of a forest officer. Under the Forest Act also all offences (except those

[2] See also section 150 of the Criminal Procedure Code : this shows that the Police would be bound to give information to the forest officer. The French Code (Art. 164) provides : "The officers and guards of the Forest administration have the right to require directly the aid of the public force in the repression of forest offences (both *délits*—graver offences, and *'contraventions'* or minor ones) as well as in search for and seizure of wood illegally cut or fraudulently sold or bought." Forest officers of all ranks form part of the military force of the country (Puton, page 153). Forest officers can therefore demand the aid of other forest officers. In a few Indian Acts (*e.g.*, Customs Act, VIII of 1875, section 25); officers are expressly empowered to demand police aid. I take this opportunity of stating that the Forest force is in its turn bound to aid the Police or Magistracy in the cases mentioned in sections 42-5, Criminal Procedure Code ; these sections the student should read.

minor ones above alluded to—section 61, Forest Act) are "cognizable" by the Police; hence, according to section 156 of the Criminal Procedure Code, the Police officer has power to investigate such a case and is bound to do so (section 157), if it occurred within his jurisdiction, unless the proviso to the section applies.

§ 6.—*Power to use Weapons or to use Force.*

I may also give a passing notice to a question which may arise, *viz.*, whether a forest officer is justified in using his weapons in resisting offences, &c.

No special rule is laid down on this subject, but the usual law of the right of private defence of course applies to forest officers as to any others. This right is stated in sections 97-106 of the Indian Penal Code, and, as I have elsewhere stated, it extends to defending one's self or the person of any one else against any offence affecting the human body, or one's own property, or the property of Government, or of any one else, whether movable or immovable, against theft, robbery, mischief, or criminal trespass, or attempts to commit these offences. The right extends even to killing the person attacking, in those very grave assaults against the person, which reasonably cause immediate apprehension of death or *grievous* hurt (section 100, Indian Penal Code), but not otherwise; and in cases against property (section 103, Indian Penal Code) only in grave cases of robbery, house-breaking by night, or mischief by fire to a human dwelling or place used for the custody of property, but not otherwise. In *all* other cases it only extends to causing harm, short of death, to the wrongdoer.

In *no* case does it extend to doing *more harm than is necessary* to effect the object of defence.

In no case also does it arise if there is time to apply to the public authorities for help.

This is only the barest outline of the subject, and for details, and especially to see when the right begins to exist, and when it ceases, the Code itself must be looked to.

I may here notice that if a *public servant* causes death, though exceeding his real powers, but acting in good faith and doing what he believed to be lawful and necessary for the discharge of his duty, and bearing no illwill to the person killed, he cannot be charged with murder, but only with culpable homicide. (Section 300, Indian Penal Code, *Expl.* 3[3].)

The Criminal Procedure Code says (section 46) that a *Police* officer, *or other* person authorized to make an arrest, may use all means necessary to effect the arrest if that arrest is forcibly resisted; but this does not extend to causing death, unless the offence for which the arrest is made is one punishable with death or transportation for life.

This could not of course deprive the officer of the right to kill the person resisting if *the resistance was so violent that it caused to the officer reasonable apprehension that he himself would be killed,* or subjected to grievous hurt; because, in that case, the right of defence above alluded to would come into play[4].

§ 7.—*Power of Search and Arrest.*

The powers incidental to an arrest, such as the power of entering a house, breaking a door and so forth, have been already described. And the "search warrant" has also been alluded to. Forest officers may be invested with powers themselves to issue search warrants (Indian Act, section 71—Burma 70).

This power as before remarked would be only necessary where there is a very large timber trade, and the locality is such that timber

[3] In which case he could, according to the circumstances, receive a modified sentence; for though, by section 304, it *might* be transportation for life, it *might*, if the circumstances were so, be only a short term of imprisonment; there is no *minimum*.

[4] By the Prussian law (*Eding*, page 182), forest officers (who must be in uniform, or with distinctive marks of office, in order to be justified in so doing) may use their weapons against forest offenders—

(1) When an attack (*angriff*) on the officer's person is made or threatened,

(2) When resistance is actually offered, or threatened so as to cause apprehension of danger (*gefährliche drohung*).

This use of weapons may only be made as far is necessary for defence. So the Austrian law (Forstgesetz of 1852, Art. 53).

pirates have opportunities for concealing and making away with timber.

§ 8.—*Power to conduct Prosecutions.*

It will naturally be asked what powers forest officers of any grade have to conduct prosecutions, or to appear as complainants in a Criminal Court, on behalf of the State, to procure a summons against an offender, and conduct the case. It is to be regretted that nothing definite is laid down about this. Most certainly forest officers ought to have a definite standing before the Magistrates' Courts in this respect [5].

At present everything is matter of inference, or at best of the permission of the Magistrate. A forest officer can certainly take cognizance of an offence and arrest an offender and take him before a Magistrate. Of course, therefore, he may appear on the trial (if one follows) as complainant; but to be complainant is not the same thing as being allowed to conduct the case, to examine or cross-examine witnesses, and address argument to the Court. By the Police Act, section 24, it is expressly provided that any Police officer may lay information, act, investigate and prosecute any case before a Magistrate. By the Criminal Procedure Code, section 495,

[5] As in the French Law, Art. 159 (an addition made to the original Code in 1859), where it is expressly provided that "agents,"—that is "administrative" or controlling and executive officers of the rank of Garde Général and upwards but not préposés, *i.e.*, guards of cantons or beats, brigades, &c.,) can conduct suits and prosecutions on behalf of the Administration, both in cases of *délit and contravention* (major and minor offences) and in all cases for compensation. And here I may again refer to the distinction made by the Forest law between the *agent* and the *préposé* in the matter of criminal prosecutions: the officers who can arrest, make a seizure, or execute a search (*visite domiciliare*) and make formal "*constatation*" of what has come under their notice (and préposés can do all this) are not the officers who conduct the prosecution (*poursuite*). The "agents" can never make an arrest nor apparently a search (*Puton*, page 114), nor can the préposé ever conduct a case, (id. and *Code d'Ins. Crim. Art.*, 182). The "agents," it is true, can make an official record (*constatation*) of what they see, but that is only a secondary function, because it would be inconvenient if they could not; otherwise they are kept free and impartial to prosecute, &c. They are entitled to be heard in argument (Code, For. 174) and to appeal (Code, For. 183-4). It is also conveniently provided that forest guards, though they may not prosecute, may serve and *execute Court processes* (Code, For. 173) except warrants of execution by seizure of property.

the Magistrate may in any trial before him (or preliminary enquiry) *permit* any person to conduct the prosecution. So the forest officer might get *leave* to prosecute. Government might also appoint forest officers "public prosecutors" for their own class of cases, under section 492. In any grave case the Government would appoint a public prosecutor or send a Government Advocate; but this does not remove the daily inconvenience of wanting a recognized *locus standi* for forest officers in the Magistrates' Courts, and the want of some section in the forest law just like the section 24 of the Police Act, or, better still, like the French Code.

As to the powers of forest officers to act in civil suits, I shall conveniently defer my remarks to the section on Government suits in the Chapter on Civil Procedure law[6].

§ 9.—*Power to compound Offences.*

I now turn to other powers specially given to forest officers.

Officers specially empowered by the Local Government under section 67 of the Forest Act (Burma Act, section 66), have the right to 'compound' all forest offences (except those grave ones specified in section 62 of the Act). The composition consists in accepting a sum of money as compensation for damage done: if this is paid, the person is set free, and any property or cattle seized is let go[7].

No person, it will be understood, is in any way bound to pay the sum required. If he thinks the sum too high, or that he has committed no offence, or can show a valid excuse, he may refuse to pay and submit to be tried for the alleged offence before a Magistrate[8].

[6] In France, as I said, the Forest Service has nothing to do with purely civil suits, except of course to give advice which is often indispensable. (Puton, p. 93.)

[7] I have discussed this matter at pages 378-9.

[8] This is so also in France (Code Forest: Art. 159); it is spoken of as "transaction" (transiger is the verb). The Forest "Agent" (not préposé) can compound any Forest offence or claim for reparation, at any time before judgment; and even after judgment, but only in respect of money penalties or compensation. This is clearly explained in Puton, pp. 150-1.

§ 10.—*The Powers under Forest Act, Section 71.*

Lastly, forest officers may be invested with certain special powers under section 71, Indian Forest Act. (Burma Act, section 70.)

Those under (*a*) and (*b*) relate to the survey of land, and enquiries into rights, and may be required when a forest officer is sent on survey duty, preliminary to a settlement or otherwise, or perhaps when he is working with a Forest Settlement Officer without himself being actually appointed Joint Settlement Officer (in which case he could be vested with the powers of the office). (Indian Act, Section 8, and Burma, section 10.)

The power under (*c*) relates to the detection of offences, and to this I have already alluded.

§ 11.—*Power to record Evidence on the spot.*

Under section 71 (*d*) Burma 70 (*d*) power may be given, which is analogous to, but not at all the same as, that exercised by forest officers under the French Code.

The forest officer empowered may hold a preliminary enquiry into a forest offence just as the Police do, only with this important difference that he may *record evidence*; and this, *provided it has been* taken in the *presence* of the *accused*, is admissible in a subsequent trial before a Magistrate, but may, of course, be disproved or contradicted.

How officers should record evidence in such cases may be learned from the section on record of evidence under the Criminal Procedure Law.

The use of this power[9] is very limited: it is not intended to be used as a matter of course in every forest case, but only where

[9] The student will find a very clear and precise account of the forest officer's *procès verbal* under the French Law, in M. Puton's Manual (pages 120-130). The *procès* must be (1) *written* (in the absence of express legal excuse) by the officer himself, must be (2) *signed* (not merely marked) by him, (3) *dated*, (4) "affirmed," that is stated on oath before a proper authority to be entirely true; which oath is recorded and duly signed; and it must (5) be registered (see Code For., 165-170). The registration is a mere fiscal act and of no real importance except

the forest officer comes across some case in which the witnesses are at hand, and the accused is either arrested on the spot or can at once be brought there; also where the facts are such that the evidence of them is likely to disappear by lapse of time and influence of weather, &c., unless they be proved, and the record of them

as regards certain fees which may be leviable for delay. The *procès verbal* must also (Code. Inst. Crim., Art. 16) state the nature of the offence, the circumstances, the time and the place of occurrence, the proofs of it, and the local or other indications of its occurrence (*e.g.*, a freshly cut stump of such and such a girth; ground disturbed, &c., &c.)

The *procès verbal* so drawn up may be of two kinds. (1) If it is prepared by *two officers concurrently*, no matter what the gravity of offence or amount of fine, &c., it is positive proof (of all *material facts* directly asserted) and cannot be contradicted, except (1) by plea of formal defect in legal requirements, and (2) by a process called "*inscription de faux*," that is by a formal plea to the Court that the *procès verbal* contains statements which are false and contrary to the facts. This issue is then solemnly tried as an incidental or side-trial by itself; if the objector succeeds, the *procès verbal* goes for nothing and cannot be amended, or supported in any way. If the objector fails, he is liable to be fined at least 300 francs and may be prosecuted for calumny, &c. The reader may think this a tremendous power to put in the hands of the officers; but it should be borne in mind, that the severity of the rule is very largely tempered by the fact that the slightest disobedience to the precise rules of minute formality, is fatal; and not only so, but the proof only extends to *material* facts directly asserted, that is to say (as M. Puton explains, *Manual*, p. 125) "those facts which fall directly within the cognizance of the senses of the deponents, and which are not matter of inference or of supposition or estimate on their part."

The result, naturally is, that the *procès verbal* to be successful must be prepared with the utmost intelligence, and the most scrupulous care and accuracy; while, for any thing like false or careless statement in it, the penalty is very severe, and few officers would dare to run the risk.

(2) If the *procès verbal* has been prepared only by one guard or agent, then it only carries the previously described degree of authenticity in minor cases (below a certain amount of penalty), and in cases above that grade, it affords *primâ facie proof only*, which may be contradicted.

If a *procès verbal* is annulled for *defects of form*, the guard, &c., may be called as a witness, but not if the *procès* is set aside on the "inscription de faux."

By the Prussian law, which is simpler (Eding. 180), "public faith" is given to a formal record of fact (like the *procès verbal*), as well as to the *valuation of damage* done, as made by the recording officer; but the record is only *primâ facie* proof till the contrary is proved. Eding justifies the force thus reasonably attached to the official act, by observing that for the management and protection of State forests a carefully selected service is organized, and the employés are schooled to

secured, at once. It would not of course be applied where no offender was found, or where none could properly be arrested at or near the spot, nor would it be where the witnesses were not on the spot or close by and could be questioned at once: in such cases a police investigation must be sought, or a complaint made to a Magistrate. At best, the power in the Act is merely a half measure, a tentative introduction of a new power, which will no doubt, on revision, be placed on a proper basis.

§ 12.—*Powers as receivers of Government Revenue.*

Forest officers have also certain powers in connection with collection and receipt of revenues, and expenditure of Government money.

There are departmental rules about the power to expend money provided in the divisional budget, and also rules about keeping accounts, dealing with revenue received, supplying subordinates with funds by imprest advances, and so forth, which are laid down in the Departmental Code, and with which this manual has no concern.

Forest officers may also receive revenue from sales of forest produce and so forth, but they have no functions to execute for its actual recovery[10]. Generally payments are made before delivery, but where this is not so, or where otherwise there are outstandings to be recovered, all the forest officer has to do is to report (in a form prescribed by order) to the Collector who can recover as an arrear of land revenue (Ind., Act, section 81—Burma, 77)—

(*a*) All money payable to Government under the Act or rules[1];

(*b*) All money payable on account of any forest produce,

(*c*) All money as expenses incurred in the execution of the Act in respect of such produce.

their duty during a long course of almost military discipline and experience. Consequently the formal deposition of an enrolled and sworn forest officer, regarding facts which come under his official cognizance, ought justly to be allowed a special degree of weight before the public tribunals.

[10] And so in France (Puton, page 94). The 'agents' send "*titres de recouvrement*," lists of revenue due, to the "director of domains," who takes steps to recover. In many cases they can be got in by summary process as in India.

[1] Except *fines*, which are recovered under the Criminal Procedure Law.

But a forest officer may so far himself act in the matter of recovering revenue that, under section 82 (Burma 78) if the forest produce is on the spot and money is found to be due on it[2], the forest officer may detain the produce till the money is paid; and if the money is already due, or otherwise is not paid when it becomes due, the forest officer may sell the produce, and the sums payable to Government on account of it are first to be paid out of the proceeds before any other lien (if any) is satisfied.

SECTION VI.—OFFENCES AGAINST THE AUTHORITY OF PUBLIC SERVANTS.

§ 1.—*Resistance to Summons, Arrest, &c.*

In order that the legal powers given to public servants may be exercised to any purpose, it is obviously necessary that a corresponding liability should be imposed on private persons in case they resist the execution of those legal powers. If forest officers, for example, can demand the aid of certain persons in putting out a forest fire, it must be made penal in those persons to neglect or refuse to give such aid. If a forest officer can arrest an offender, it is penal for the offender to resist a *primâ facie* lawful arrest.

I shall therefore, in concluding this chapter, notice the chief cases in which, as far as the Forest administration is concerned, the public officer's power is upheld by law in the way alluded to.

These cases are almost all of them included in one chapter (X) of the Indian Penal Code, headed "Of contempts of the lawful authority of public servants." Many of these ctions in this chapter refer to Courts of Justice and judicial proceedings, and these, of course, I entirely omit.

There are also a few provisions applicable to my subject which the Code gives in other parts, not in Chapter X.

Under sections 172-3 are punishable, cases where a *legal notice, summons,* or *order* is to be served, and the person *absconds* or

[2] Either as the price of it, or as a charge or fee or duty leviable in respect of it.

resists service. The latter section includes also the intentional *tearing down* of notices, &c., legally *posted*, as, *e.g.*, in cases where a summons which cannot be served personally, is attached to the door of the house where the person resides.

Under section 174 is punishable the intentional refusal to *attend* in obedience to a summons, order, &c., lawfully issued. Section 175 punishes a similar *refusal* to *produce documents*.

Sections 178-79 and 180-81, refer to refusal to take oath, or answer questions, or to sign depositions and statements, and to making false statements on oath.

Section 182 may sometimes come within the practice of a forest officer. Here the offence is that of a person giving *false information* to a public officer, so that the officer may *use his power* (of arrest, search, seizure, &c.) to the *injury* or *annoyance* of any person, with whom, but for the false information, the officer would never have thought of interfering.

§ 2.—*Resistance to Seizure or Arrest.*

Forest officers have in certain cases the power to seize property liable to confiscation or cattle in the act of trespassing. *Resistance to seizure* in such cases is punishable under section 183.

Resistance to lawful *arrest of the person* comes under section 224, and resistance offered to the arrest *of another person*, under section 225.

§ 3.—*Omission to give Aid or Information.*

More directly important to forest officers are sections 176-7, which punish the *intentional omission* to give *information* of a fire, a forest offence, &c., or the giving of *false information* by persons under legal obligation to give information, and of course *true* information, as far as they know.

Section 187 further makes it penal to refuse or neglect intentionally to give *assistance* in cases (which I have before explained), in which the public servant is empowered by law to require assistance.

§ 4.—*Obstruction in executing Public Duty.*

The general case of *obstruction* of a forest officer in the *execution of his duty* is punishable under section 186[3].

Section 189 punishes *threats of injury* to a public servant, with the object of inducing him to do, or forbear from doing, any official act; the threat is punishable whether it imports injury directly to the public servant, or indirectly to some one in whom the offender believes the public servant to be interested.

In another part of the Code will be found similar provisions applying to cases where the offender goes beyond *threats*, and actually uses force, or causes hurt, or grievous hurt, in the attempt to deter the public servant from his duty. (Sections 332, 333, and 353, Indian Penal Code.)

Section 184 punishes obstruction to a *lawful sale* conducted by a public servant as such: and section 185 refers to *illegal bids* at such auctions[4].

These are sections which I alluded to as not contained in Chapter X of the Penal Code, and there are a few others which may be mentioned.

Sections 170-1 punishes the personating of a public officer or wearing a garb or carrying a token similar to that used (as a matter of fact) by any class of public servants.

[3] Section 188 can also apply to forest cases. Disobedience of an order under section 25 of the Forest Act, regarding carrying fire, regarding removal of obstructions in streams, orders regarding disposition of rafts in transit, or of timber in a depôt, are instances of "orders lawfully promulgated:" but they are better dealt with under the Forest Act, as offences against the Act or rules, as the case may be.

[4] As "illegal" means, not only what is punishable, but what gives rise to a civil claim, a forest officer who is bound by his service rules not to trade in timber *might* come under this provision.

I may here mention that forest officers are sometimes much hampered in public sales by *combinations* among merchants. This, however annoying, is not criminal, nor does it come under the sections quoted. We have nothing analogous to the French law (Code Forest: Art. 22), which prohibits secret combinations, and "*manœuvres*" to spoil auctions—"*les troubler ou à obtenir les bois à plus bas prix,*" &c. such acts involve penalties besides damages and the nullity of the "*adjudication.*"

Ill-disposed persons might resort to this device, either to escape detection in commiting offences or to impose on the ignorant.

I should also not omit to mention that while severe penalties are threatened, as we have seen, against public servants who accept any illegal gratification or bribe, the persons who *offer* such bribes are no less punishable, as they become *abettors* of the offence of taking the bribe, even if the "taking" does not happen, *e.g.*, if the bribe is refused.

PART V.

THE CIVIL LAW AS FAR AS RELATED TO FOREST ADMINISTRATION.

CHAPTER XX.

THE LAW OF CONTRACT IN ITS RELATION TO FOREST BUSINESS.

§ 1.—*What is a Contract.*

It would be impossible, within the space that remains to me, to present the student with anything like a complete view however elementary, of the whole law of contract; especially as the whole of the law has not yet been reduced to the terms of legislative enactment for India. Act IX of 1872, "the Contract Act," only deals with the general principles of contract and with certain branches of contract law.

There are many legal rights and obligations which attach to persons as members of society, by reason of the relation in which they stand to one another, *by nature or in the social order.* Contract law, however, deals with a class of obligations which do not arise *except on the voluntary entering into* relations of two persons between themselves.

Any person may enter into relations with another by proposing to do, or abstain from doing, something, and the other, being desirous of the result proposed, accepts the proposal; the latter in most cases proposes to do, or not to do, something in return, which proposal the other party in his turn accepts.

Then, on these proposals taking shape and being accepted on both sides, a series of obligations and rights arise as between these two parties, which form the subject of the *law of contracts.*

§ 2.—*Branches of the law of Contract.*

As these relations may be almost infinitely various, so the branches of contract law are numerous, and they are separately treated of in text-books and often in Statutes and Acts, because, though

there are some principles which run through *all* agreements of any kind whatever, there are special rules which apply to each branch. So we find certain well-understood divisions, such as the law of *sales* of movable property; *conveyances, leases, mortgages,* and other transfers of immovable property; *bailments* (*i.e.*, when one person *pawns* or deposits some movable property with another, or undertakes a *mandate,* or to do something for another) *partnership agreements,* contracts of *indemnity* and *guarantee* (of which contracts of security for faithful service, for holding a person free from certain pecuniary or other losses in certain circumstances, warrants of soundness of horses, or that goods correspond to a sample, are familiar examples); contracts of agency (rules about the relations of principal and agent in any business).

There are also some subjects, still truly part of the law of contract, which have become in practice further separated, such as the law of "Master and Servant," of "Carriers" (people who agree with consigners of goods to carry their goods to other places), the law of "Landlord and Tenant" and the law relating to Negotiable Instruments (Bills of Exchange and Promissory Notes). All these are branches of Contract law, but it only requires a moment's reflection to see that they all of them exhibit certain peculiar features, and that, consequently, a special group of rules has been developed in each case[1], so that those groups of rules have come

[1] While most contracts refer to something to be done, after which there is an end of the matter, contracts between master and servant, landlord and tenant, create a continuing relationship, and so give rise to many special rules. So with public carriers of goods, the necessities of the peculiar business, the risks run by both parties, give rise to special rights and liabilities. Negotiable instruments are also connected with a number of special rules, the result of long-established mercantile usage, and the peculiar character of documents which pass from hand to hand and have several parties to them, the original drawer, the person on whom the bill is drawn, the acceptor, the subsequent holders, and so forth. The Indian Legislature has not yet codified all these subjects, or reduced them to the terms of one or more acts. But the student is aware that the law of Negotiable Instruments has been embodied in an Act (XXVI of 1881), and that there is a Carriers Act (No. III of 1865). The subject of "Master and Servant" is in India one of difficulty, and though bills or drafts of prepared laws have been published they have as yet found little acceptance.

in practice to be treated as almost separate or independent topics of law.

§ 3.—*The Indian Contract Act. Topics treated in the Manual.*

The Contract law of India (Act IX of 1872) is divided into eleven chapters: The first six deal with the general rules which are common to all contracts whatever; the last five deal with five special kinds of contract—(1) sale of goods; (2) guarantee and indemnity; (3) bailments; (4) agency; and (5) partnership.

In the present chapter I only propose to deal with the subject in a very fragmentary way. I shall confine my remarks, first (section 1) to a general view of the essential features of all contracts; next (section 2) to a notice of the powers of forest officers to enter into contracts on behalf of the State; next I shall add (section 3) some practical remarks regarding just those topics of contract law which are likely to come within the forest officer's practice. Such will be chiefly contracts to buy and sell, contracts for work, contracts of guarantee (security for fulfilment of agreements and for the fidelity and good conduct of clerks and subordinates). A few words will also be said about Agency and Partnership, as forest officers have often to deal with agents of traders or with firms.

Of sales of land and leases of houses or land I shall say nothing. It is true that such deeds may be required in connection with forest business, but the Contract Act does not expressly deal with them (except so far as to lay down those principles which apply to them in common with all contracts), and moreover the forms of deed required and the conditions of the engagements are special so that in all such cases the forest officer will hand the matter over to the legal advisers of Government. Forest officers, moreover, are not usually empowered to execute on behalf of Government, documents regarding land.

Lastly, a section (section 4) will be devoted to a few remarks on the specific performance of contracts.

SECTION I.—GENERAL PRINCIPLES.

§ 1.—*What is a contract.*

The Contract Act commences with a series of definitions. I always use terms exactly in the sense which the Act defines them to have.

Some of them it is particularly important to remember; for example, "contract" by itself, means *an agreement which is enforceable by law.*

I said the Contract law depends not on any existing relation between two persons, but comes into play when these persons establish the connection between them of their own accord.

This connection is set up in the first instance by one of them making a *proposal* to the other.

§ 2.—*The Proposal—the Promise.*

A proposal means that one person signifies his willingness to do, or abstain from doing, something *with a view to the other person assenting* to his doing it (and probably making a proposal on his part to do something or pay something in return). It is essential that the proposal should be made to evoke an *assent* from the other person[2]. When that person *assents,* the proposal becomes a *promise.* The person proposing is the *promisor,* and the acceptor is *the promisee;* thus these two persons are brought into a relation which is the foundation of a contract.

It is obvious that a proposal must be accepted and the acceptance known to the proposer before it ripens into a *promise,* and hence there is always a possibility of the proposal being revoked. This can be done of course by communicating a distinct notice of revocation.

But a legal revocation is also held to take place if the person to whom the proposal is addressed has not accepted within the time specified in the proposal, or if no such time is specified by

[2] *e.g.*, a man might signify his willingness to do something, and yet if he did not do so to obtain the other's assent, he would not make a proposal; as if he said to another, "I am ready and willing to give you a beating."

the lapse of a reasonable time (which is a question of a fact to be considered according to the circumstances) without communication from the person addressed. (Act IX of 1872, section 6.)

And so by failure to accept a condition precedent to acceptance, as if A writes to B that if he will withdraw a certain advertisement, or cease legal proceedings, he will do so and so, and B does not withdraw, or cease the proceedings, the proposal is revoked. So by the death or insanity of the proposer, if the addressee hear of this before accepting.

So much for the proposal; acceptance to be valid must be absolute and unqualified. Of course the acceptor may attach certain conditions, but if these are clear, they form reciprocal proposals requiring acceptance in their turn; it does not matter how many proposals and acceptances there are on either side, provided each proposal finds its corresponding definite acceptance [3].

Performance of the conditions of a proposal, or acceptance of any consideration for a reciprocal promise, which may be offered with a proposal, is an acceptance. If I say to a man I will give you 100 rupees if you will go to Lahore and do so and so; if he takes the 100 rupees, though he does not say he will go, he has accepted the proposal; so if he goes without saying that he accepts, he is entitled to get the 100 rupees. So if a contractor says, I will cut you up as many sleepers as you like from wood in such a forest at 1 rupee each, you may not at the time say you will give an order, but if you do, and he takes the order, he is bound to the rate specified.

An acceptance or proposal may be express or implied.

If you go into a shop and take up a cake exposed for sale and eat it, though neither you nor the shopman have spoken, there is an implied proposal of the shopman to sell it at a reasonable price, and an implied acceptance on your part to buy it and pay the reasonable price.

[3] The acceptance must correspond to the offer exactly. If A offer to take B's house from 25th July, it is not an *acceptance* from B to reply that he will give it from 1st August.

§ 3.—*Implied Terms of Contract.*

It often happens in contracts that some of the terms are implied. If a watchmaker proposes, and you accept his proposal, to clean your watch, it is implied that he does the work in a workmanlike manner, and does not return the watch scratched all over with tool-marks (for example). What the implied contract is, or what the terms in a contract (otherwise expressed), really mean, "must be in each case collected from the surrounding circumstances; generally, there is some usage or custom which leaves no doubt as to the intention of the parties, and when this is not the case, the promise to be implied may generally be gathered from a consideration of what it is probable, under the circumstances, that the party should promise[4]."

The student will remember that an important instance of an implied promise occurred in considering the legal position of a forest officer on appointment. In accepting service he *implies* a promise to abide by all the rules of service and lawful orders of his superiors, and to accept pay, pension, dismissal, or other penalty for misconduct, as those rules provide.

§ 4.—*Quasi-contracts.*

I may here just allude to cases which are spoken of as *quasi-contracts*. These arise in cases where there are relations between two persons, which closely resemble those created by contract, though no such contract (except, if you like to say so, by a fiction of the law) exists. These are treated of in Chapter V of the Act. A familiar instance is where you find some property and take it into your custody; here you are bound to try and find the owner and to act in short, as if it had been deposited with you (bailment) by some one on a distinct contract. Another case is where money is paid or goods are delivered by mistake, or under coercion. The law lays upon the recipient the duty of restoring the property just as if he had received it and agreed to give it back.

[4] Cunningham and Shepherd, Indian Contract Act, page 44.

§ 5.—*In Contract, usually one Promise against another.*

Where one party makes a proposal and the other assents, there is, as we have seen, a legal *promise;* one party is the *promisor*, the other is the *promisee.*

Where a man makes a promise to do something[5] it is usually because the *promisee has done*, does, or in his turn *promises to do*, something which the other wants done or is benefited by. This thing done or to be done, is the motive for the promisor's promise, and is in legal language called the *consideration* for it. This will be found to be very important, because, speaking generally, if a man assents to a proposal, that is makes a promise, and there is no legal motive or "consideration" for it, he is not bound at law to fulfil the promise.

The 'consideration,' as I said, may be past, present, or to come. Example (1)—I promise to pay you 1,000 rupees now, because last year I asked you to pay, and you paid, the rent of a house on behalf of my family at Simla; (2) I agree to pay my bookseller 10 rupees for the book which I take and put into my pocket, whenever he chooses to send me the bill; or, take a *negative* case, I withdraw a suit filed against you and you agree to pay the debt one month hence with 12 per cent. interest; (3) I promise to pay you 5,000 Rupees three months hence for goods coming out from England, which you agree to deliver to me when they arrive.

Every promise (consisting of proposal and acceptance) of course constitutes an "agreement" though a bare "agreement" might not be enforceable at law, and therefore not a *contract* within the meaning of the Act; and where one promise is made against another promise, this set of two promises makes one agreement, and, as here the one promise is the consideration for the other, we have a *contract* provided that certain further requirements are fulfilled.

[5] Or not to do something. I do not complicate the sentence by always introducing the negative; but it is obvious that a man may desire to have a thing not done, as well as to have a thing done, *e.g.*, I may propose to a man *not* to proceed to sue me in Court, and I will do so and so for him.

§ 6.—*Agreements which are Contracts, i.e., are enforceable at Law.*

In order that an agreement should be enforceable (*i.e.*, "a contract") certain things are necessary—

(1) Each party must be *competent* to act, and
(2) Each party must *consent* of his *free* will;
(3) The *consideration* must be *lawful, i.e.*, the promise on one side, or the thing done, must be lawful,
(4) The *object* must be *lawful*, the promise on the other side or the thing done, must be lawful),
(5) The whole agreement must not be of the classes which the Act expressly declares to be void,
(6) Lastly, if there is any law requiring any particular contract to be in writing or to be registered, it must be so.

§ 7.—*Competence to Contract.*

Persons are competent if they are of *age, i.e.*, not minors according to the law to which they are subject, as Europeans, Hindus, Mahomedans, &c.[6]

The rules are various, but it will be *safe for general purposes* to ascertain that the person contracted with is not under 18 years of age, if he is not in charge of a Court of Wards (as in that case he is a minor till 21 years). With Europeans also, 21 may be the age. The law is too complicated to explain in detail in this place.

They must be of *sound* mind.

"A person is said to be of sound mind for the purpose of making a contract, if *at the time when* he makes it, he is capable of understanding it, and of forming a rational judgment as to its effects upon his interests."

"A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind."

"A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind."

[6] The laws about *minority* are given in Cunningham and Shepherd, Indian Contract Act, under section 11 (page 50, &c., 3rd edition, Calcutta, 1878).

Illustrations.

(*a*) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

(*b*) A sane man, who is delirious from fever, or is so drunk that he cannot understand the terms of a contract or form a rational judgment as to its effect on his interests, cannot contract while such delirium or drunkenness lasts[7]. (Indian Contract Act, section 12.)

The person must not be incapable by any law, of contracting. This will principally concern the case of contracts with married women. If the contractor is an European British subject, the consent of the husband should be obtained, as it will save all difficulty. But contracts regarding a woman's separate property are valid if made by her alone. It is, however, impossible for the student to go into detail on this matter, and legal advice should be taken on the particular points of any case which arises.

If the contracting party is a married woman, either Hindu or Mahomedan, it is, as a matter of precaution, hardly safe to accept a contract without the husband's consent. It is certainly not clear, at any rate under Hindu law, to what extent a married woman can contract alone, and the Mahomedan law is also against such freedom.

§ 8.—*Consent of Free Will.*

"Two or more persons are said to consent when they agree on the same thing *in the same* sense." (Section 13.) People should be sure that they are agreeing about the same thing, not about different things under the same name, or there is no consent or agreement. Mr. Cunningham gives the case of two persons who agreed to buy and sell respectively, the cargo of a ship called the *Peerless*, and it turned out that there were two ships of this name, both sailing from Bombay at different dates; each party meant a different ship. It was held there was no agreement between them.

But this will not enable excuses to be made where there is a definite description or expression of the meaning in a written

[7] In this the Indian Act departs somewhat from the English law; there, drunkenness, if purely voluntary and not made use of to mislead the person, will not make a contract void, at least not absolutely or necessarily.

contract. Under the Evidence Act (section 91), the terms of a contract reduced to writing are to be proved by the writing itself, and verbal evidence cannot be offered to vary or contradict the terms of it. Nor, even if the contract was in words only, can a person, who, by his declaration, act, or omission, has caused another to act in a certain way, turn round and prove that his declaration was untrue.

Consent must be *free*, that is, must not be obtained by "coercion" (defined in section 15); "undue influence" (defined in section 16); "fraud" (defined in section 17); "misrepresentation" (defined in section 18); and "mistake" (subject to the provisions of sections and 22)[8].

"Coercion" is (briefly) doing or threatening any act which is forbidden by criminal law, detaining or threatening to detain any property to the prejudice of any person, so as to make any person enter into the agreement.

"Undue influence" is much more difficult to understand, and it will be necessary to get good advice in any case in which such a plea is raised as invalidating a contract. It may occur in cases where one person has an ascendancy over another, or where one person places great confidence in another, or where there is real or apparent authority, and where the influence so obtained is used to the deprivation of the person acting under such influence, of his freedom of choice. It is also using undue influence to take advantage of old age, infirmity, illness, or distress, mental or bodily, so as to get a consent which could not otherwise be given. Speaking very generally—coercion refers to "physical" inducements and undue influence to "moral."

§ 9.—*Fraud.*

"Fraud," as a cause vitiating the agreement by affecting free consent, would require an essay to itself to explain it properly: but I think the section 17 will be sufficiently plain to the student to

[8] I do not for the sake of space print these sections; they can easily be referred to on occasion, in the Act itself.

enable him to grasp the ruling involved. In *fraud* there is some real culpability and dishonest intention, while in *misrepresentation* there may be a mistake only. Both may operate to make the consent *not free*, and therefore to make the agreement unenforceable.

It is necessary that the fraud should be either directly by a party to the agreement or his agent, or some one in connivance with him. If it directly affects the ground of the whole contract, the contract will be voidable at option of the party suffering the fraud. The fraud may, however, only affect some part of the contract and not go to the ground of it, and thus it may not have the same effect. There may be a fraud *in act*, or *in word*, or a fraud in *concealment*. If, for example, I wish to sell a lot of teak logs which I know are riddled with insect holes, and carefully fill them up with wax, colouring the surface and passing a comb over it to restore the grain of the wood, and say nothing about the defect, or, if I sell you a lot of sealed and marked bottles of wine which I know contain only coloured water, this is fraud by concealment.

But it may not necessarily be fraud merely *to keep silence*. "Here," says Mr. Justice Cunningham, "the question whether the silence is fraudulent or not depends entirely on the relation of the parties: traders for instance, as a general rule, deal with each other at arm's length, and are understood to be under no obligation to volunteer information about the matter of the contract. On the other hand, there are cases where it is the duty of each party, not only to tell the truth, but to tell the whole truth, and when accordingly the mere failure to mention a fact may constitute fraud;" such is a case of marine insurance by an underwriter.

It may be the case that although a silence about defects or other features of a transaction may be fraudulent, the effect of the fraud will not be to render the contract voidable, *if the other party had the means*, by use of ordinary care and diligence, of discerning the truth. But this only applies to cases of *silence*, not to any actual fraudulent mis-statement: this will *always* render the contract voidable.

§ 10.—*Misrepresentation.*

Misrepresentations are—(1) positive statements by one party *even though he believe them* true, if made without the degree of information which warranted belief; (2) any breach of duty on his part, putting the other at a disadvantage or misleading him to his prejudice; and (3) causing the other to make a mistake as to the subject-matter of the agreement.

The effects of fraud and misrepresentation are equally to make the contract voidable at the option of the party misled, but misrepresentation, like fraudulent *silence*, will not avail if the means of discovering the *truth* were available. A person misled *need* not void the contract, he has another remedy: he may insist on the other person fulfilling the contract, in such sense that he is put in the same position as he would have been had the mis-statements been true; in other words he may insist on the party making good the untrue statements by means of which he induced him to enter into the contract.

§ 11.—*Mistake.*

The last means by which legal freedom of consent is hindered is *mistake.* If both parties are under a mistake, as in the instance of the cargo of the ship *Peerless*, there is no consent and the contract is void.

The mistake must not be a more erroneous opinion about the *value* of a thing, and it must be a mistake of *fact*, not of its *law;* and it must affect *both* sides. A mistake by one side (not being, or amounting to evidence of, fraud or misrepresentation) will not affect the contract. (Sections 20, 21, 22.)

§ 12.—*Lawful Object and Consideration.*

The next essential to a valid contract is that the "object" and the "consideration" should be lawful. I have explained what the consideration is, and the object is what is to be done for the consideration. Hence, in contracts where there is a promise on each side, either thing promised becomes the object to one party and the consideration to the other. A agrees with B to saw up 1,000 trees

into logs for 2,000 rupees. Here, as regards A, the sawing is the object and the payment of Rs. 2,000 is the consideration; as regards B, the payment is the object and the work to be done the consideration. That which is from one party's view the object, is from the other's the consideration, and *vice versâ*.

All contracts are said to have their object or consideration lawful unless either object or consideration is—

(1) forbidden by law (*Example*, to make 1,000 false notes for a payment of 500 rupees or to drop a prosecution for a robbery on receiving a certain sum);

(2) of such a nature as to defeat the provisions of any law, *e.g.*, an agreement by a forest officer (who is not allowed to buy timber at a Government auction) to pay so much if some other person will buy the timber in his own name and hand it over to the officer;

(3) fraudulent (*Example*, an agent agrees with some person in consideration of receiving a gratuity, to obtain a lease of land at a low rate from his principal for the other);

(4) involves or implies injury to the person or property of another. (*Example*, a contract with a printer to print and publish a pamphlet, libelling a certain person in consideration of a money payment: or a contract by a person with a forest office munshi that he shall induce the Divisional officer to give contracts to that person, the munshi getting a percentage);

(5) is regarded by the Court as immoral or as opposed to public policy. (*Example*, an agreement with a man to allow his daughter to live immorally with the other party in consideration of a money payment[9].)

§ 13.—*Void Agreements under the Act.*

Next, besides these general grounds of unlawfulness of object or consideration, the Act itself has expressly declared certain agree-

[9] See also the illustration to section 23.

ments to be void. It will not be necessary, for the practical purposes of the forest officer, to notice any of these except the following:—

(1) that agreements absolutely without consideration are void, except under certain conditions;

(2) that agreements are void, absolutely restricting the right of either party to have recourse to legal tribunals, or limiting the time within which they may have such recourse.

The exception to this latter is an agreement to refer a matter to arbitration, and that only the amount awarded shall be recovered.

Such an agreement is valid, and an action for damages will lie[10] and if the person who had contracted to refer to arbitration were to bring a suit in respect of the subject he had contracted to refer, the suit would be barred. He could, of course, sue for the amount awarded him, because the contract to abide by the arbitration has been fulfilled.

(3) Agreements, the meaning of which is not certain and cannot be made certain, are void[1].

(4) Agreements by way of wager are void. A few other void agreements may be gathered from other parts of the Act.

Thus agreements to do an impossible act (section 56) are void[2]. And so agreements to do an act which becomes impossible, as when a singer contracting to sing loses his voice, or a war breaks out which renders a contract impossible of performance.

[10] But the clause in the Contract Act, saying that such an agreement could be ordered to be specifically performed by the Court, is repealed (see Specific Relief Act I of 1877, section 21, and schedule II to the Act).

[1] The question when evidence is admissible to clear up an ambiguous document is settled by sections 93-7, Indian Evidence Act.

[2] But if one party knew of the impossibility and the other did not, the first would be bound to confess it; as if A agrees to marry B, not knowing that B is already married to C, and is subject to a law which prohibits polygamy, and so the contract is impossible, A may be entitled to compensation. And it is to be remembered that a contract is not wholly impossible because part of its subject-matter existing at the time has ceased to exist. (Section 13, Act I of 1877.)

Promises which include what is partly legal and partly illegal are dealt with in sections 57 and 58.

§ 14.—*Remarks on Agreements without Consideration.*

Having disposed of these cases of void agreements, I return to offer some remarks on the *absence* of *consideration.*

The general rule is that if there is no consideration the agreement is void—is not in fact, adopting the definition of the Act, a "contract." (Section 25.) But to this there are some intelligible exceptions—(1), if the parties have put their intention beyond mistake by reducing their contract to *writing* and have got it *registered* under the law for the registration of assurances, *and the contract is made on account of the natural love* and affection between parties standing in a near relationship; (2), if it is a promise to compensate a person who has voluntarily[3] done something for the promisor of something which the promisor was legally compellable to do (as *e.g.*, he paid a tax to save his property from attachment and sale); (3), if the contract (which must be in writing) is to pay a debt, which would be a lawful debt, claimable but for the effect of the limitation law.

A *gift* actually made, as between the donor and donee, is not rendered invalid by this provision of the law.

The above relates to agreements absolutely without consideration, but not to contracts where the consideration exists, but is inadequate. Mere inadequacy is not a ground for voiding the contract; but if the free consent is denied, it may be taken into account by the Court in considering whether the consent was freely given. The illustration in the Act is the case of a person agreeing to sell a horse worth Rs. 1,000 for Rs. 10. If there was no question about the parties having consented, the contract would not be void, but if the person who agreed to sell denied that he had freely consented, the gross inadequacy of the price said to have been agreed

[3] *i.e.*, of his own will without being asked by the promisor, otherwise there is a consideration. (Section 2*d*.) The previous request made and fulfilled is the consideration for the present promise to do something.

on would be an important point in judging whether the consent was free or not.

§ 15.—*Contract when to be in writing.*

The last legal requisite for a 'contract' is that it should be in writing, *if* any law specially so require it, and registered *if* the Registration Act (III of 1877) requires it to be registered. The only contracts that are required to be in writing are those special kinds of document mentioned in several Acts of the Legislature. Not any of these concern or can come under a forest officer's notice in any way, nor am I aware that any kind of contract which a forest officer is likely to be concerned in is required by any *law* to be in writing[4]. Consequently, as far as *legal validity* is concerned, all contracts may be verbal. We have no such law as the English Statute of Frauds requiring certain kinds of contracts to be in writing, or "under seal."

No doubt it would be very foolish (as a matter of practice) not to commit a contract to writing, especially as there might be great disputes and difficulty of proof afterwards, and therefore service and local rules often require that forest officers should reduce all contracts to writing if dealing with more than a certain value. But that has nothing to do with the *legal* validity of a verbal contract. A contractor could not come into Court and say, I deny my liability on this contract, because, according to Conservator's order to his subordinates, approved by Government, this contract is over such and such a value and therefore ought to have been written.

So also there may be a law that *if* the contract is in writing it must be registered, if, for example, private persons chose to execute a written lease or sale of land or house of Rs. 100 in value, they *must* register: and the contract would not be valid otherwise, because the writing could not be offered in evidence, and a verbal agreement would not be admitted when the parties had made

[4] In provinces where the Transfer of Property Act (IV) of 1882 is in force, certain sales and mortgages of immovable property must be in writing.

a writing on the subject. But they are not *obliged* to have any writing at all; and though there may be certain *advantages* conceded by the Registration law to registered documents over unregistered ones and oral contracts, this does not affect the legality of the contract itself. For example, if you mortgage to me verbally a house for a debt of Rs. 1,000 it might be *oral*[5], *but* (unless possession had actually been given), a registered deed of mortgage to another person would prevail against the unsupported oral mortgage. And if it was a case of a sale of a cottage for Rs. 80, which *need* not be registered, a voluntarily registered deed of sale of the same cottage would be given effect to *before* the unregistered one.

§ 16.—*Performance.*

Having now understood what agreements are legal contracts, the next important subject is the *performance* of contract undertakings. Each party must perform or offer to perform his promise, unless this is dispensed with by the other party, or is excusable by law (as will presently be explained.)

If the party dies, the heirs or representatives of the party are still bound to perform, unless a contrary intention appears from the contract (*ex.*, a particular painter agrees to paint a picture but dies before he does so, here his heir or representative may not be a painter at all, or not be as good a painter, and therefore it could not have been the intention of the contract that the representative should fulfil it).

When one party is ready to perform and has made an offer of performance, and the other does not accept the offer, he is no longer responsible, and does not thereby lose his rights under the contract: but the offer must be unconditional, and made at a proper time and place, and with proper opportunity to the other party to ascertain that the offer corresponds to what the contract bargains for. (Section 38.)

When a party to a contract has refused to perform, or disabled

[5] Except in provinces alluded to in the last note. See sections 9, 54, and 59 of the Act IV of 1882.

himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified by act or word his assent to its continuance. (Section 39.)

In some contracts it is evidently the intention of the parties that either party should *himself* perform his part, otherwise a competent person may be employed to perform it. If performance by a third party is accepted, performance cannot afterwards be demanded of the party himself. (Sections 40-1.)

When there is a joint promise by several persons (unless a different intention appears by the contract), all the persons,—or after the death of one, the survivors, and the representative of the deceased,—and after the death of all, the representatives of all jointly, must fulfil the promise. (Section 42.)

But in such a case the promisee may (in the absence of express agreement to the contrary) make any one of the joint promisors perform the whole promise[6]; but the one so compelled has a right to claim contribution from the others in equal shares.

If one of a number of joint promisors is released by the promisee, the others remain liable, and the release, as regards the promisor, does not free the released person from liability to the other joint promisors. (Section 44.)

Joint promisees can claim performance on the same principle as that which applies to joint promisors under section 42. (Section 45.)

§ 17.—*Time and Place.*

In some contracts it is really important that they should be performed exactly at the time agreed on; in others it is not so, and often no time is specified at all.

If no time is specified, the performance must be within a *reasonable* time, which is a question of fact in each particular case. (Section 46.)

When the promisor has undertaken to do his part on a certain day, and without application on the part of the promisee, he must

[6] That is, every joint promise is presumed to be *joint and several.* This is different from the English law.

perform it in the usual hours of business and at the proper place; *e.g.*, a person promising to deliver goods on a certain day to a warehouseman in business, must perform this on the understanding that he delivers at the warehouse, and in usual business hours. A delivery at midnight or at some unusual place, would not be a performance. (Section 47.)

There are provisions in the Act regarding place of performance (when that is not stated) which will be found in sections 48-9, but need not be here detailed.

As a general rule about *place*, in the absence of express agreement, the place for the delivery of goods sold is the place at which they are at the time of sale, and if not in existence at the time, at the place at which they are produced. (Section 94.)

But in practice the question of *place* of performance rarely gives any difficulty.

There is a further rule about *time*, where it is essential and where it is not, which will be better understood when the rules which now follow have been understood.

§ 18.—*Order of Performance of reciprocal Promises.*

I have before remarked that in the great majority of contracts there is a promise on either side, each of which promise is the object of, or the consideration for, the contract, according as it is looked at from one party's point of view or the other's. It then becomes a question in what order these promises are to be performed. In this respect contracts have been by English lawyers classified under three kinds:—

(1) Where the two promises (or the two sets of promises of which there are several on either side) are to be performed simultaneously, &c. I agree to deliver 10,000 sleepers at Agra within three months and you to pay Rs. 30,000 on delivery;

(2) The promises are independent: each must fulfil his own independently of what the other does, and the remedy of either is *not* to forego *his* duty, but to sue the other for

damages (or, if the law be so, sue him for specific performance);

(3) One promise is by the terms of the contract to be performed first, and it is (what is called) a "condition precedent" that one should be performed before the other can be claimed.

The Indian Act has not adopted this classification, which in fact is the subject of much argument when it is attempted to be applied rigidly in practice; but it is useful to understand it in theory, and the idea of it is not altogether lost in the practical provisions of the Contract Act which follow.

For example, section 51 clearly applies to the first case (simultaneous performance); neither party is bound to perform unless the other is ready and willing to do his part simultaneously.

The same principle is also applied if the contract expressly states the order in which the promises are to be performed, or if the nature of the business clearly indicates it. (Section 52.) The parties must perform their parts in the order thus established. This is an instance of the third case—"condition precedent."

And section 54 further completes the subject: the party bound to do his part first, must do so; but if he fails or refuses, not only is the other party not bound to carry out his share, but he is entitled to claim compensation. *Example:* A agrees with a contractor B that B shall fell 2,000 trees and saw them up into sleepers, for a payment of so much per sleeper sawn, A agreeing to find the axes, saws, &c., necessary for the work. Here it is obvious that A's finding the tools is to come first in order: it is a condition precedent: if he does not, B is not bound to saw up the wood, and not only so but he can claim compensation for loss of reasonable profits on the contract. (See also section 75.) Where there is some order of performance indicated, it is not the intention that the acts should be simultaneous: then there arises the *second* case (independent agreements on each side), and each party must independently do his part without looking to the other, the remedy for either being to claim damages for the other's non-performance.

It is necessary here to observe that if one party *prevents* the other from doing his share, not only has that party no claim, but the party prevented can claim compensation. (Section 53.)

Not only must he not prevent, but he must give *reasonable facilities* to him to perform (section 67), *e.g.*, in a contract to repair generally; it may appear from the circumstances that the owner should point out the places where repair is needed; his failure would excuse the contractor, and so if he prevented or did not facilitate the repair, by the necessary moving out of furniture, and so forth.

These provisions, it is said, are more stringent than those of the English law, which, as a rule, inclines against avoiding the contract altogether and refers the injured party to compensation by damages.

§ 19.—*Time for Performance.*

In one case, however, the Indian law takes off the edge of the rule about failure to perform—*viz.*, in the case of *time* for performance—a rule which I reserved for consideration till now. If one promise is to be executed within a certain *time*, and then the other promise becomes due, the rule about performance is not applied in all its harshness, *viz.*, that failure in the first should render the contract at once voidable, with a claim to compensation by the other party: but it is equitably asked, did it really matter whether the promise being reasonably performed, it was not performed exactly in the time fixed?—is it fair to allow that if there has been a genuine though not precisely formal or strict performance, the other party should take advantage of such a formal error and void the contract and claim compensation, as under the rule I have described? The answer is no: the edge of the rule is equitably taken off by looking to the facts and intention of the parties. If it is clear that there was an express object in fixing a precise time, then any failure in regard to time is no longer formal but material, and the rule holds good: but if time was not essential, and the performance, though not technically to the day, has been good and useful, (even though the delay has somewhat injured the other party,) then that other party cannot void the contract and get off

his part (section 55, clause 2); nevertheless he is entitled to compensation for any actual injury caused by the delay: but he must, in accepting performance, give notice that he is going to claim such compensation. (Section 55, clause 3.)

Lastly, where under these circumstances, one party, owing to the failure of the other (sections 19, 39, 53-4), is entitled to rescind or put an end to the contract, and does so, the other party is released from performing his part specifically, but is in many cases still liable to pay compensation.

§ 20.—*Benefit received by Party rescinding the Contract.*

But the important rule is, that if the party having rescinded a voidable contract, has received *some benefit* (though not the whole intended result) from the other party, he is bound to restore that benefit, *i.e.*, to make it good. Supposing, for instance, owing to a failure of a contractor who had engaged to completely saw up, mark and launch 20,000 sleepers, the forest officer was obliged to avail himself of a lawful power to put an end to the contract, but 5,000 sleepers were lying cut in the forest but not launched, and 1,000 had been actually launched: here, although he had not the whole work done, it is obvious that he has had *some* benefit, and he must therefore, to use the words of the Act, "restore the benefit" and calculate a fair portion for the part of the work done and allow that. And this would still hold good even if the failure to supply the whole 20,000 sleepers caused a heavy loss in consequence of a failure to meet some Railway contract for sleepers in the plains: damages might be claimed, but subject to the adjustment of the benefit received. (Section 64.)

The same rule (section 65) holds where a contract is discovered to be void, or becomes void: any benefit actually taken under it must be restored. (*Example:* A pays B 1,000 rupees in consideration of B's agreement to marry C. A's daughter C is dead at the time. The agreement is void, but if B has received the 1,000 rupees he must repay it to A.)

§ 21.—*Appropriation of Payments.*

Connected with the subject of performance, is the case where a person has several debts to pay,—in other words, he has promised to pay several sums, and he makes a payment (*i.e.*, a part performance) without intimating to which debt or account he wishes it to be credited.

Of course, if any intimation is made or *appears from the circumstances*, the payment must be applied to such debt as is intimated. (Section 59.) But if not, the creditor may apply it to any *lawful* debt *actually due* and *payable, no matter* whether the debt is barred from recovery in Court by the Limitation law or not. (Section 60.)

If neither party makes an appropriation, a Court settling the account (for example) would apply the payment to the debts in order of time, or, if they are simultaneous, to each proportionately. (Section 61.)

§ 22.—*Contracts which need not be performed.*

We have considered how some agreements are void, and some are voidable. We now come to the case where something occurs in the course of a contract otherwise valid, which excuses or supersedes its performance.

One such case is rather important, namely, where there is a "novation" as it is called, or the substitution of a new contract, which is intended to supersede the old, so that the new one, and *not* the latter, has force. Such a substitution may either affect the whole contract, or some of its terms. Or it may be that a contract is rescinded altogether.

In all these cases the original contract can no longer be claimed. The alteration may affect terms, rates, time, place, &c., or the parties; the creditor may accept a new debtor and release the original one.

The rules of English law (some of which appear somewhat questionable) have not been altogether followed in the Act.

Any promisee may partly or wholly dispense with or remit

the performance of the promise made to him, and there is no technicality about this being "without consideration." A man who has a bond for Rs. 1,000, and chooses to accept a payment of Rs. 500 in lieu of it, is entitled to do so, and this waiver or dispensation may be made at any time before breach of the contract or after it[7].

Whenever a voidable contract is *rescinded*, the rescission must be communicated or revoked in the same way as a *proposal* which originates a contract may. (Sections 3, 4, 5, and 6.)

§ 23.—*Breach of Contract.*

The last subject to be considered in this sketch of the general principles relating to *all* contracts, is the consequence of a *breach* of a contract.

The result of a failure on the part of a promisor who is bound to fulfil *his* engagement first in order of time, we have already seen; it is to absolve the other party who has made a reciprocal engagement from fulfilling that engagement, and also to entitle him to compensation for loss of profits from the contract. If I agree with A that he will convey 500 tons of teak wood to a certain depôt, at the rate of Rs. 2 a cubic foot, and I am to *advance* him Rs. 25,000 and fail to do so, not only is A excused from conveying the wood, but he can claim compensation for the profits he proves he would have made on the contract.

And again, if one party having done his part, or being ready and willing to do it, according to the requirements of the case, the other party, without lawful excuse, fails or refuses to perform his part, here the latter becomes liable to pay damages for his breach of contract.

§ 24.—*Nature of Damages.*

It is obvious, however, that the "damages" or "compensation" thus easily spoken of, are not in all cases obvious or easily determined in an actual case of dispute.

[7] The English law draws a distinction here.

The first principle is that the damage compensated is that which naturally arises in the usual course of things, or one which the parties knew, when they made the contract, was likely to be the result of a breach of it. And the damage is direct and immediate, not indirect or remote.

This is a very necessary rule, for the effects of any act are really almost infinite, and if the law were to go into every possible ramification of consequence that ensued from a breach of some contract, there would be no end to the suit, and to the expense of the enquiry. Damages, therefore, not directly flowing from the breach are said in law to be "too remote" and will not be awarded.

An important 'explanation' to this section must here be noted. In some cases the *means of remedying the inconvenience caused by non-performance* may exist, and this may be important to take into account in estimating damages. For example (illustration *b*), A hires B's ship to go to Bombay and there take up a cargo which A is to provide, and bring it to Calcutta: B's ship fails to go to Bombay, but A got other conveyance on equally advantageous terms which answers his purpose, only he is put to some trouble and expense in getting it; here the damages A would get would only be compensation for the trouble and expense so incurred, the existence of the means of remedying the breach of contract here having obviated all the chief loss to be apprehended.

§ 25.—*Penalty. Liquidated Damages.*

It sometimes happens that persons put down in their contract that if there is a breach a certain *penalty* of fixed amount shall be payable. The English law was that this penal sum would not be decreed by the Court as long as it was an arbitrary *penalty;* and it was held to be so in all cases where the real damage, as distinct from the fixed sum, could be ascertained. But where it was in the contemplation of the parties that there would be great difficulty in estimating the actual damages, and that it was their intention to obviate this inconvenience by agreeing on and specifying a sum by way of *liquidated damages* as it is called, *then* this sum could be recovered.

The Indian Act has not exactly adopted this rule (which no doubt often is difficult to apply), and merely declares (section 74) that if a sum is specified, in case of breach, the party suffering, *whether or not actual loss is proved,* is entitled to receive *reasonable* compensation, *not exceeding* the sum named; which comes to this, that more than the fixed sum cannot be claimed, but if the Court does not think the sum ought to be given in full, it can reduce it to a reasonable sum; the Court cannot, however, refuse to allow the reasonable sum on the ground that actual damage is not proved, as long as there has been a real breach of the contract.

There is an exception to the rule which it is important to remember. The penalty named in any bail-bond, recognizance, or other instrument of the same nature, and in any security bond for the faithful performance of any *public duty* or *act in which the public are interested, is* recoverable as named, in case of breach of the agreement. (Section 74, exception.)

But this does not apply to security taken to fulfil a Government contract, at least not *necessarily:*—it would have to be *specially* shown that there is an act to be done in which "the public are interested." (Section 74, exception.)

SECTION II.—CONTRACTS BY FOREST OFFICERS ON BEHALF OF GOVERNMENT.

§ 1.—*Original Power to contract for Government.*

I now proceed to explain how it is that forest officers can make contracts for Government[8]. All the contracts which the forest officer, as such, has anything to do with are not contracts with him, but are popularly spoken of as Government contracts. It is obvious then that he makes them on behalf of Government pursuant to some delegated authority, and that personally he is not entitled to any benefit, nor liable to any responsibility, under the contract.

[8] ca n only adopt the recognized official reasons and procedure as I find them. I am quite convinced, personally, that it is all based on a misinterpretation of the Act, as will appear presently.

As long as Government undertakes any kind of executive duty in departmental working, not to speak of other branches of Administrative Government, it cannot help entering into contracts. It may need to buy land, or lease it, to enter into contracts for goods to be supplied, or for work to be done.

Owing to the position of Government as successors to the East India Company, under the Act for the better Government of India[9], "the Secretary of State for India in Council" was declared by that Act to be the representative of the State for the purpose of holding property, and of suing and being sued in the same manner as the East India Company might have been. Section 40 of the Act provides that the Secretary of State, with the concurrence of a majority of his Council, may sell and dispose of all real and personal estate, &c.; may raise money on mortgage, &c.; may purchase or acquire "any land or hereditaments or any interest therein, stores, goods, chattels and other property, *and is empowered to enter into any contract* whatsoever, as may be thought fit for the purposes of this Act * * * *."

§ 2.—*First attempt to remove the difficulty.*

But it is obvious that Government business could not be carried on for a week, if every contract had to be sent home to be executed or signed by the Secretary of State, and if a majority of his Council had to concur in each contract.

This difficulty was partly removed in 1859 by the provisions of the Statute 22 and 23, Vic. cap. XLI, sections 1-2.

This provides that (*a*) the Governor General in Council; (*b*) the two Governors; (*c*) the Lieutenant-Governor of the North-Western Provinces; and (*d*) any officer entrusted with the government, charge or care, of any Presidency, Province, or District[10]

[9] 21 and 22, Vic. cap. 106.

[10] It has been held by the Government law officers (and indeed it admits of no doubt) that "District" here means, not the charge of a Collector or Deputy Commissioner, but something analogous to the Presidency or Province previously spoken of, such for instance as Ajmer, Berar, &c., which are hardly "provinces."

in India (*i.e.*, any Lieutenant-Governor, or Chief Commissioner, or Resident having the charge of a territory) may (subject to such restrictions as the Secretary of State, with the concurrence of a majority of his Council, may prescribe) enter into contracts and buy lands and goods (exactly as in the 40th section of the Act of 1858, already quoted).

By the second section the Secretary of State in Council may be named in the contracts so made as a party to it (*i.e.*, as representing the State), and it is "sufficient to use the designation of the Secretary of State in Council in such deed, contract, or other instrument, and the same may be *expressed* to be executed on *behalf of the Secretary of State in Council* by or by order of" the Governor General in Council, the Lieutenant-Governor, &c., &c., "but may be executed in other respects in like manner as other instruments executed by or on behalf of him or them respectively in his or their official capacity."

These contracts may be enforced against the Secretary of State in Council for the time being, but "neither the Secretary of State nor any Member of his Council, nor any person executing such deed, contract, or other instrument, shall be personally liable in respect thereof, and all liabilities, costs, and damages in respect thereof shall be satisfied and paid out of the revenues of *India*."

It will be observed that this supposes that the contracts will be executed by the head of the Government in the province, on behalf of the Secretary of State, that they will be executed in the usual form in which Government instruments are executed, the Governor's act being indicated by his Secretary's signature, &c., as usual, only the document must say that it is made *on behalf of the Secretary of State by or by order of the Governor*. There is nothing whatever in this section which implies that the power of making contracts may be further delegated to certain officers, heads of departments, District Engineers, Collectors, and so forth; nor was anything settled on this subject till 1870, when the 33 and 34. Vic. cap. LIX was passed.

§ 3.—*Third Stage.*

The proximate cause of the passing of this Act was that a number of deeds had been issued in Madras for the grant of certain lands, by an official called "the Inam Commissioner." These deeds should (according to the 22 and 23, Vic. cap. XLI) have been expressed to be executed "by order of the Governor of Madras n behalf of the Secretary of State, &c.," but this form was not followed: the deeds were simply expressed to be executed "on behalf of the Governor[1]." The matter had been remedied by a special Act as regards those particular deeds, but it was apprehended that other deeds generally in other parts might be held invalid *for a like reason.* Thereupon the Act (33 and 34, Vic. cap. LIX) declared (section 1) that all instruments executed before the Act, and for a limited period after it (to allow of its becoming known), if they were expressed to be executed "by" or "by order of" or "on behalf of" the Governor General, Governor, or Lieutenant-Governor or Chief Commissioner, or other officer entrusted with the care, &c. (as in the previous Act), were no less valid than if they had been executed in the form required by the Act 22 and 23, Vic. cap. XLI (which is, as we have seen, "*by or by order of the Governor, &c., on behalf of* the Secretary of State.")

The second section gives power to the Governor General in Council, by Resolution from time to time, to *vary the form of execution* required by the 22 and 23, Vic. cap. XLI, or to empower other authorities under his order to *vary it.*

§ 4.—*Power given to Public Officers.*

This second section has been held to authorize the Governor General in Council to issue a Resolution in the Home Department[2],

[1] This appears from the 32 and 33, Vic. cap. XXIX, the Act which was separately and at once passed to render valid these particular inam deeds.

[2] The opinion is held that the terms "*vary the form of execution*" mean "*vary the mode of execution with reference to the party executing.*" I submit that this opinion cannot be correct. Looking to plain history of the case (and no one can doubt the facts of it as set forth in the text), the question of the subordinate officers who were entitled to contract by 'order of' the Governor, &c., was never contem-

No. 989, dated Simla, 23rd June 1877, which is the "basis on which the authority of certain public officers to make contracts" by order of the Government of their province, on behalf of the Secretary of State, rests.

Subsequently, another Resolution (Home Department), No. 23, dated Simla, 15th October 1878, was issued in the same sense, with reference to contracts by forest officers; but it stated that Conservators, Deputy Conservators, Assistant Conservators and Sub-Assistant Conservators might make contracts, to *such extent and within such limits* as each Local Government might, by notification in its official Gazette, direct.

The precise value and amount of contracts which each grade can execute must therefore be ascertained in each province, and it would be impossible here to reprint a collection of the orders that have been issued[3].

It will be observed that while these orders are in force, delegating the power of contracting, no *orders* have been issued *varying* "the form of execution" (in any other sense). Therefore it is important to observe the form required in the 22 and 23, Vic. cap. XLI, and for each document to be expressed that it is made by "so and so, Deputy Conservator (or Assistant Conservator, or as the case may be), by order of the Lieutenant-Governor (or Governor as the case may be), on behalf of the Secretary of State for India in Council." This form must never be omitted.

SECTION III.—PRACTICAL REMARKS REGARDING GOVERNMENT CONTRACTS.

§ 1.—*The Form.*

It will have been gathered from what I have previously said

plated by the Acts, and the only question was that of formal invalidity arising from the variation or absence of the proper form of words "by order of the Governor, &c., &c., on behalf of the Secretary of State."

[3] These powers are given by Government as regards the legal force of the contract; but there is nothing to prevent Conservators requiring all contracts above a certain value to be submitted to them before execution, in order to satisfy them that errors of drafting, &c., are not committed. It is an excellent plan to adopt this precaution.

that verbal contracts for nearly all the works or supplies a forest officer is likely to be concerned with, will be binding as far as their legality is concerned. But of course it is only in petty matters, regarding which there is no doubt, that word of mouth is thought sufficient. In all larger matters the contract will, as a matter of course, be reduced to writing.

I may now say a few words about the general form in which contracts are drawn up. It would not be useful, in a manual devoted to explaining principles, to give a set of forms even for the most frequently required contracts, such as contracts to fell and saw up, to float and deliver at depôt, timber of any kind, contracts for good service, security bonds, and so forth; but it will be better for each office gradually to provide itself with these, with the aid of the Government law officers of the province.

But I desire to make it perfectly clear that there is no magic or legal efficacy in any particular form. It is to secure neat and workmanlike documents that I recommend having standard forms.

The only matter of form that is essential is (I may repeat), that the contract *must* state that it is made by so and so *by order of the* Lieutenant-Governor or Governor or Chief Commissioner *on behalf* of the Secretary of State.

It isto be remembered that all the English law and practice of drafting deeds, much of which is matter of ancient and historical custom and growth of usages, has nothing to do with India[4].

In England, for example, there is an important distinction between contracts in simple writing and documents under seal which are "deeds." This latter practice of sealing might once have been a very important business, calculated to impress the parties and make an act so attested particularly binding. But now it has become a mere legal form, and the seal is only a red wafer stuck by the signature, on which, after signing in the presence of the witnesses, the person puts his finger saying "I acknowledge this as my act and deed."

[4] At any rate beyond the local limits of Presidency towns with which I am not concerned.

I have accordingly seen this form adopted in India, but it is quite unnecessary and should never be allowed in Government contracts[5].

§ 2.—*Signature of Attesting Witnesses.*

The signature of the forest officer or other officer empowered represents the Secretary of State's signature; that of the other party must be clearly affixed. If he cannot write, he must put his seal or his mark with his own hand, and underneath this is written, "the mark or seal of so and so." It is not *necessary* that each contracting party should sign on the same day. Each may sign in the presence of his witnesses when it is convenient.

It is not necessary that any particular number of witnesses should attest the signature, but if convenient it is as well to get two persons to the signature of each party. It is essential that the signature should be actually written in the presence of the witness or witnesses: it is not enough to sign the paper first, and then get witnesses to sign, telling them merely "this is my signature."

§ 3.—*Language used.*

In other respects[6], the only real requisite to a Government contract is that it should be quite clear and definite, and should express who the parties are, and that each has definitely assented to the contract. The terms should also set forth clearly what the *object*—the work to be done—is, and what the *consideration*—the payment

[5] This law seal has nothing to do with the impression of a signet being so often adopted by natives, which with them is not a seal in our sense, but a *signature* or *mark* when they cannot write.

[6] We have in India no legal distinction between "a deed," "an indenture," or any other form. It is really quite immaterial whether a contract begins, "Memorandum of an Agreement made this——day of————between——of the one part (hereinafter called the Contractor) and————Deputy Conservator of Forests, *by order of the Lieutenant-Governor of————on behalf of the Secretary of State for India in Council* (hereinafter called the Deputy Conservator), of the other part, or whether any other form is used. It is only a question of neatness and precision. Only it is essential that the words in italics should be used, and that again when the contract closes; it should be again repeated "in witness whereof the said——— contractor, and the said———Deputy Conservator (by order of the Lieutenant-Governor of———on behalf of the Secretary of State for India in Council) have set their hands, this——day of————, &c."

or other return for the work done—is. These, and especially the latter, should always appear clearly on the face of the document. If a *time* is fixed, make it clear what the parties really intend about time, specifying also clearly the *place* at which delivery is to be made.

Make it quite clear if there is any agreement about the order in which either party is to fulfil his part,—whether money is to be paid first and work done thereafter, or work first and money payment after, or part work and part payment, whatever it is. If the work to be done has a number of conditions and terms or rules connected with it, it is convenient to append to the instrument a list of the terms or conditions, in the form of rules or numbered paragraphs. Then, in the body of the instrument it is necessary only to specify that the work (described generally) is to be carried out in accordance with the rules and conditions laid down in the "schedule hereto annexed."

Every probable requirement of the case should be specified, and as little necessity for implying conditions and terms as possible, should be left.

But there is no use in verbiage; and it is to be remembered that the long and cumbrous phrases and endless repetitions and reduplications of words which have become customary in English deeds, and have been retained in England owing to the natural conservative feeling of the legal profession, lend no legal solidity whatever to a contract deed in India, and are altogether unnecessary[7].

The one object is to put the matter so clearly that it will be impossible to find room for misinterpretation, or for raising doubt, or for escaping an obligation on any point which it was the intention of the parties to impose.

§ 4.—*Specification of Penalties.*

It should be borne in mind what was said about the effect of specifying *penalties* to be paid in case of breach of contract.

[7] The introduction of such redundant forms of expression, as well as the silly ceremony of putting red wafers on the documents and alluding to the contract as "sealed," as well as signed, should be steadily resisted.

But no doubt in cases where the damages are very difficult to ascertain, it is advisable to make it clear that under these circumstances of difficulty (which should be alluded to), the parties have agreed fully that in the event of a breach, such and such rates or sums of money should be recovered. The Court would be at liberty to examine the matter, but if the terms were properly explained, the chances are great that the Court would find the terms "reasonable" and decree them accordingly. Whenever the penalty (or the measure of damages) is mentioned, it should always be definite, a sum of money, a fixed rate per piece, &c.; no vague or general phrase should be allowed.

§ 5.—*Clauses referring to Settlement in a certain Court.*

Sometimes clauses are put into contracts, signifying that if there is a dispute, the matter shall be determined in some particular Court, and not otherwise. This is entirely useless and misleading. No such clause has the slightest force. You cannot oust the jurisdiction of any Court by any agreement whatever. If, under the Civil Procedure Code, a Court of Lahore, say, has local jurisdiction and is otherwise qualified, no agreement that the case is to be heard in Calcutta will have the slightest effect.

An agreement that if a dispute arise, arbitration shall be resorted to, would, as we have seen, be allowable, though such an agreement cannot be *specifically* enforced (on a suit for specific performance), but would only give rise on breach to an action for damages. (But see the provisions regarding arbitration in the Civil Procedure Code.)

§ 6.—*Language of Contract.*

The language (whether English or Vernacular) in which contracts are drawn up will depend on local orders. Large firms, who better understand English, or have English-speaking people about them, can be contracted with in English: but otherwise the contract should be in a language that the party with whom Government contracts can understand.

§ 7.—*Security.*

It is usual to take security for every Government contract. I think as a rule it is better to have the security in a separate bond, and not included as a clause in the contract. I shall make some remarks on the law of the subject presently.

§ 8.—*Waiver.*

Here forest officers should be careful to keep to the terms of a contract: if they *allow* them in the course of the work *to be varied* (without a distinct writing made for the express purpose), difficult questions may arise as to Government having *waived* strict performance.

SECTION IV.—ON SOME PARTICULAR KINDS OF CONTRACTS.

I shall now add a few notes on some special kinds of contracts which forest officers are likely to be concerned with[8].

§ 1.—*Sale of Goods.*

In a sale of goods, the contract is effected by the offer and acceptance of ascertained goods (*i.e.*, goods in existence at the time and known to the parties) for a price. Either the goods are delivered as the price is paid, or there is a part payment or part delivery, or an agreement, express or implied, that the payment, or delivery, or both, shall be postponed.

The sale is complete when the whole or part payment is made, or the whole or part of the goods is delivered. But if the delivery or payment, or both, is postponed, the property passes when the pro-

[8] From Major Bailey's useful note on contracts drawn up for his Circle, I learn that in the North-Western Provinces instructions it is added (though this would be understood naturally) that a contract need not express that it is to be done and over by a certain date; a contract may be made to continue in force till notice is given by one party or the other. (Board of Revenue, $\frac{\text{No. 655}}{\text{VI—349}}$, November 19, 1880.) It is also stated that when a contractor is to get "commission" it should always be worded so as to be *entirely in the* option of the forest officer to give or withhold it; but I respectfully point out that the proposal to add a condition that the contractor cannot *sue for it in Civil Court* would be quite useless. The contract can make it so purely a question of favour that a suit *would* at once be dismissed; but no contract absolutely *not to sue* would be of any force.

posal is accepted. (Section 78.) The property does not pass in things not yet ascertained, or to be made, or prepared or provided (sections 79-80), nor does it pass where anything remains to be done to the goods by the seller in order to ascertain the price (section 81). *Example:* A Deputy Conservator agrees to sell 2,000 sleepers to a merchant at a price for first-class sleepers, on condition that he will pass the sleepers and mark as first-class, at a timber station named, after which the price is payable: the property does not pass till the sleepers have been marked at the timber station.

Some further particulars about ascertainment are provided by sections 82, 83, 84.

If goods are not ascertained, they become so by the selection of the one party assented to by the other.

When once the property has passed under the above rules the loss which may occur is the buyer's. (Section 86.)

In the case of sale of goods not only not ascertained, but *not in existence,* no right of property passes till, after production, some act is done in pursuance of the agreement of sale, by the seller, or by the buyer with the seller's assent.

Example.—An agreement to sell 2,000 sleepers to be made in a certain forest, the property passes as soon as the forest officer announces that (pursuant to the terms of the agreement), the sleepers are ready at the agreed place and held at the purchaser's disposal, or as soon as the purchaser, seeing the sleepers ready stacked at the place, takes possession with the forest officer's assent. (Section 87.) If the forest officer refused assent, the ownership could not pass, though there might be a case of breach of agreement.

Where no *price* is fixed, it is what the Court (for otherwise there will be no dispute and the terms will be agreed on) considers reasonable. (Section 89.)

§ 2.—*What is Delivery.*

We constantly speak in matters of sale, of the delivery of goods: what is delivery? Section 90 explains that it is doing

anything which has the effect of putting the materials purchased in possession[9] of the buyer, or of some one authorized by him to hold them on his behalf. The illustrations to this section may be read.

Delivery to a carrier of goods has the effect of a delivery to the buyer, but does *not* render him liable for the price, if the goods do not reach him, unless the delivery is so made that the carrier is responsible for the safe custody or delivery of the goods. (Section 91.)

A delivery of part of the goods "in progress of the delivery" of the whole, passes the ownership in the whole, but not if there is an intention of severing the part taken from the rest: then, only the part taken is delivered. (Section 92.) *Example:* A sells to B a stack of firewood to be paid for by B on delivery. B begins to take away the wood "in progress of" taking the whole, the ownership in the whole has passed; not so if B applied for and got leave from A to take away *a part* of the wood: the rest would not be 'delivered.'

If there is no proviso to deliver at a particular time or place, it is a rule that the seller is not bound to do anything till the buyer *applies* for delivery. (Section 93.) And in the absence of special provision, goods are held to be deliverable at the place in which they were when sold, or, if not in existence, where they will be when produced. (Section 94.)

§ 3.—*Title to Goods sold.*

Section 108 will give the general rule about the question of valid title to goods sold and the title that is passed by sale. The forest officer is not likely to sell goods other than those in which the title of the Government is clear by law. But the general rule is that the seller passes no better title than he had himself.

A general exception is in the case of sale of goods by a person in possession (or holding a bill of lading, and selling on the bill); here the property will pass if the *buyer acts in good faith, and there are*

[9] The student will remember what was said about 'possession' in the first chapter.

no circumstances which might reasonably have indicated to him that (the holder of the bill of lading, or) the person in possession, is not lawfully entitled to sell, or is not the real owner.

This provision replaces the English law rule of 'sale in market overt,' as it is called. This rule is not applicable in India, and is in itself a matter of custom, not easily applied as a general rule of law. The rule in the Indian Contract Act is quite sufficient. If, for example, you choose to buy a gold watch from a disreputable-looking person, who offers it for much less than it is worth, the circumstances at once should raise a suspicion that the man has stolen the watch; and if you take it you will have got it on no secure title, and the real owner can get it back; but if, in the absence of all such circumstances, you bought it, as if, *e.g.*, you found the watch in an open, respectable shop and bought it at a fair price, and yet if it should turn out to have been stolen, the owner could not make you give it up.

The same exception also holds good in case of a sale by *one of several joint owners.*

§ 4.—*Seller's Lien.*

There are some remaining features peculiar to the law of sale of goods, which will need a brief mention: the *seller's lien* for the price, and his right of *stoppage in transit* (which is only an extension of the former right in certain cases after the goods have left his possession on their way to the buyers) and the right of *re-sale.* The subject of warranty I shall not deal with.

As long as goods remain in possession of the seller, and the price is not paid (or any part of it), he has his lien, and need not part with the goods till paid (unless the contract specifies otherwise). (Section 95.) If there is an express contract that the payment is to be made at a future day, and no time is fixed for the delivery of the goods, there is no lien, and the buyer is entitled to present delivery. But if the buyer "ceases to pay his debts in the ordinary course of business," *i.e.*, becomes insolvent, and the goods have not been delivered, they may be detained till the price is paid

(section 96); and generally, if a buyer, though entitled to delivery, chooses to let the goods remain in the seller's possession and the day for payment passes without payment being made, the seller may then refuse to give up the goods till payment is made. (Section 97.) Nor will the fact that in the *interim* the buyer has sold the goods to some one else deprive the original seller of his lien, unless indeed he has recognized the title of the subsequent buyer. (Section 98.)

The right of stoppage in transit is, as I said, merely an extension of the lien after actual possession has been lost, and while recovery of the goods is still possible. It *only* arises in case the purchaser becomes "insolvent."

The subject is explained in sections 99-106, and need not be further mentioned here.

Re-sale is the necessary complement of the *lien* just spoken of. When its lien is in exercise, and the price is not paid, the seller may, after *giving notice* to the buyer and allowing the lapse of a reasonable time, *re-sell* the goods to recover the price, and the buyer (*i.e.*, the original buyer) must bear any loss, but is not entitled to any profit, which may occur on the re-sale. (Section 107.)

All this supposes that the goods have not yet actually passed out of the seller's possession, with an extension in the case of *transit*, where, though virtually out of the seller's possession, they are not yet in the buyer's.

But if once the buyer has got actual *possession*, then his failure to pay does not rescind the sale, but in the absence of special agreement otherwise, the goods are his property and the remedy is to sue him for the price, &c. (Section 121.)

§ 5.—*Sale by Auction.*

When a sale is by *auction*, there are some special legal rules rendered necessary by the circumstances of this kind of sale.

In the first place there is a separate sale of each lot, and the ownership passes in each as it is knocked down. (Section 122.)

If at an auction the seller "makes use of pretended biddings"

to raise the price, the sale is voidable at the option of the buyer. (Section 123.)

§ 6.—*Contracts of Guarantee.*

Contracts of guarantee[10] must also be spoken of. It will be in two cases that surety bonds are used,—one when a contractor gives security that he will repay advances, or faithfully fulfil his promises; another when a forest clerk, or treasurer, or a subordinate forest officer (in case this is ordered) gives security for faithful service and to account for all money he receives.

In these contracts we have already noticed that if a *penalty* is directly agreed on as forfeitable in case of misconduct, this sum is (exceptionally) recoverable: but only in the case of surety for faithful dealings of the duties of a *public* servant: and this rule does not apply to security on a Government contract merely because Government is one of the contracting parties, unless the contract is of such a nature that a Court can decide that the public is really interested in it. (See section 74.)

In a contract of guarantee, the consideration is somewhat special: the person who guarantees, say, the faithful conduct of A, a forest clerk, to the Deputy Conservator of a division, gets nothing directly from the Deputy Conservator; but the fact that the *principal* is benefited, that *he* gets salary or commission, or whatever it is, is legally held to be the consideration for the "surety's" agreement. (Section 127.)

In every case, unless the surety it liable only to the extent of a sum fixed in the contract, he is liable for whatever the principal debtor becomes liable for. (Section 128.)

The surety may be for one act or transaction or for a series (as in case of a surety for faithful services in a public office); in

[10] Defined in section 126. It is a contract to perform the promise, or discharge the liability of a third person in case of his default. The guarantor is called the "surety:" the person whose performance is guaranteed is the "principal debtor," and the person (Government in our case) is the "creditor." These contracts may be oral or written.

the latter case it is said to be a "continuing guarantee." (Section 129.)

The difference is this, that whereas the surety, having once contracted to answer for a specific act, cannot get off his bargain any more than he could off any other contract engagement, in a continuing guarantee he may at any time revoke his guarantee as to future transactions, by giving *notice* to the creditor (section 130); and in such continuing contract, the death of the surety operates as a revocation, as far as future transactions are concerned. (Section 131.)

If two persons contract as joint sureties, and then by special agreement between themselves agree that one shall only pay up in case the other fails, this will *not limit* the responsibility of both to the 'creditor,' *even though he was aware* of the arrangement. (Section 132.)

When a person becomes surety, and there is a variance in the terms of employment, made without the surety's consent, this operates as a discharge of the surety in respect of transactions after the variance (section 133); and generally, if the creditor does anything inconsistent with the rights of the surety, or omits to do what his duty to the surety requires him to do, so that the eventual remedy of the surety against the principal be impaired, the surety is discharged. (Section 139.) The illustrations given may be quoted thus:—

(*b*) A is surety for B against misconduct in his office, the duties of which are defined in an Act of the Legislature. By a subsequent Act "the nature of the office is materially changed." This operates as a discharge, and if B misconducts himself after the change A is not liable as surety, *even though the misconduct was on a point of duty which the subsequent Act did not touch.*

(*Or c*) A Divisional officer appoints A to manage a selling depôt for sawn timber at Amritsar. A is to get a monthly salary and account to the officer for all sales; C becomes

his surety. Afterwards the Divisional officer, without C's knowledge or consent, changes the salary to a commission on sales: C is not liable for any misconduct after the change. The consent of the surety to any such change cannot be *implied* from the mere fact of his knowledge and silence, but it may from the circumstances[1].

Another illustration (actually given under section 139) is one worth attention. Supposing A contracts with a Conservator to saw up 20,000 sleepers and to be paid by instalments at certain stages. C is surety. If the Conservator, to urge the work, without C's knowledge forestalls certain payments, C is discharged. It is obvious that the Conservator's action tends to make C's responsibility greater than C contemplated, since, at the given date, A's responsibility for the advances is greater than it would have been under the contract.

Whenever the principal debtor becomes legally discharged either by a contract with the creditor, *or by the effect of an act or omission of the creditor*, the surety is discharged (section 134); and so when the creditor agrees to give time, or not to sue, or makes a composition with the principal debtor for his liability, unless, of course, the surety assents. (Section 135.) But mere forbearance to sue or enforce any remedy does not (in the absence of special agreement) discharge the surety. (Section 137.) If there are co-sureties, a release of one does not discharge the others, nor save the one relieved from his liability to contribution to the others. (Section 138.) This is a mere repetition, in the particular case of sureties, of the general principle of all joint promises, which I have above noticed. (Section 44.)

A surety who has paid up on behalf of the principal debtor has all the rights which the 'creditor' had against the principal debtor (section 140); and is entitled to the benefit of every

[1] Authorities quoted in note to section 133 in Cunningham and Shepherd's Indian Contract Act.

security which the creditor had against the principal debtor at the time when the contract of suretyship was entered into, whether known to the surety or not; and if the creditor loses, or without the surety's consent parts with, such security, the surety is discharged to that extent. (Section 141.) Supposing, therefore, that a forest officer takes a mortgage of land, as his security, from a clerk, and also gets B to go security for him, if the officer gives up the mortgage the security will be discharged to the extent of the value of the mortgaged land.

But this, it will be remembered, applies to securities existing *at the time* when the surety contracted, not to others which the creditor may *subsequently* have taken.

Sureties are also protected by law by a still fuller adoption of the principle that *misrepresentation* may affect contracts. It is not in *every* case that misrepresentation renders voidable an ordinary contract (*see p. 457 ante*); but in surety contracts *every* misrepresentation concerning a material part of the transaction renders the contract voidable (section 142), and silence as to a material circumstance on the part of the creditor at once renders the guarantee so obtained invalid. (Section 143.)

Co-sureties for the same debt, even (though each is bound under a separate contract and does not know of the other's co-suretyship) are liable to pay up in equal shares (in the absence of agreement to the contrary (section 146), and co-sureties bound in different sums are bound to pay equally up to the limit of each sum fixed. (Section 147.) (*Example:* A, B, C are co-sureties for D. A's bond bears the limit of penalty of Rs. 10,000, B's of 4,000, and C's of 6,000. D defaults to extent of Rs. 18,000. B will have to pay 4,000 (as he cannot be made to pay more under his bond), C will pay Rs. 6,000 for the same reason, and A Rs. 8,000.

It is understood that every contract of guarantee carries with it an implied promise to the surety from the principal debtor, to reimburse him all sums which he has paid rightfully on his behalf, but not sums paid wrongfully. (Section 145.).

§ 7.—*On Dealings with Agents.*

The subject of agency I do not propose to treat in detail. The practical object is to put forest officers in a position to act in ordinary cases legally, where their dealings are with a person or a firm through an agent.

I am, therefore, to look at the agent here merely as the medium of communication between the principal and the third party (the forest officer). As *representatives* of the principal, it is not necessary that the agent should be capable of contracting. In other words, a principal might be bound by the act of an agent, though the latter was a minor. As a matter of practice, a person would not employ a minor as agent, because, though the representation would be valid, the minor agent could not be bound by any terms of a contract between him and his principal. (Section 184.)

Speaking, generally, of the contract of agency as between the employer and the agent, that of course depends on the general rules of contract, only that it is said that *consideration* is not necessary to a contract of agency (section 185), and that a person may contract to act as agent for one without getting any pay from one, or any other tangible consideration. But the distinction is only in appearance, because, obviously in a voluntary agency, some consideration must exist : the agent likes the position and gains credit by it, or does it out of the love he bears to his employer, or some motive of the kind, so it is hard to say there is actually no consideration.

The authority of an agent may be expressed by words said or by the written terms of a power, or it may be implied by the course of business. (Sections 186-7.)

Example.—A owns a shop in Calcutta, which he occasionally visits. B is in charge of the shop, and as such, is in the habit of ordering goods in the name of A, for the purposes of A's business and paying for them out of A's funds with A's knowledge. Here B has an implied agency to order goods.

An agent having authority to do an act or carry on a business has authority to do everything lawful which is necessary in order to

do the act, or to carry on the business, or whatever is usually done in the course of conducting such business. (Section 188.)

In an *emergency*, the agent may do all acts, for the protection of his principal from loss, that a private person of ordinary prudence would do under similar circumstances in his own case. (Section 189.) See also section 237 as to belief induced, that certain things were within the authority of the agent.

§ 8.—*Sub-Agent.*

An agent cannot delegate his power to a sub-agent unless by the custom of trade a sub-agent may, or from the nature of the business must, be employed. But where a sub-agent is properly employed, the principal is, as far as third parties are concerned, responsible for the sub-agent just as if he had appointed him himself. (Section 192.)

If a sub-agent is employed without authority, the agent employing him becomes his principal and is responsible for him to his own principal, and to third persons, but the original principal is not responsible. (Section 193.)

But if an agent has an express or implied authority from his principal to employ another person to act *for the principal in the business of the agency*, such person so made is not a sub-agent but a direct agent as well as the other. (Section 194.)

§ 9.—*Ratification.*

A person may not have given authority for certain acts, but if he *ratifies* them afterwards, that will have the same effect as if he had originally given authority (section 196), except in the case mentioned. (*Vide* section 200.) Such ratification may be expressed or implied by conduct. (Section 197). But it is essential to ratification that the person should have materially sufficient knowledge of the facts (section 198), but if he ratifies part of one whole transaction he ratifies the whole. (Section 199.)

§ 10.—*Revocation.*

An agent's authority may be terminated by revocation, or by the principal dying or becoming of unsound mind, or adjudicated insol-

vent (section 201), but not to the prejudice of the agent if the latter have an interest in the business. (Section 202.)

The revocation will not however affect acts already done, and obligations already incurred. (Section 204[2].)

Neither revocation nor renunciation by the agent will affect third parties *before it becomes known to them.* (Sections 201-8.)

§ 11.—*Certain relations not considered.*

I have already observed that my object being to inform forest officers of any rule of law which it may concern them to know in case they have to deal with agents, I omit all notice of an agent's duty to his principal (sections 211-21), or the principal's duty to the agent. (Sections 222-24.)

As regards third parties all contracts made with the agent may be enforced and have the same legal consequences as if made with the principal. (Section 226.)

Any notice given to or information obtained by the agent (*given in the course of business*) has the same effect as if given to or obtained by the principal. (Section 229.)

§ 12.—*Personal Liability of Agent.*

An agent as such does not personally enforce, nor is personally responsible for, contracts entered into on behalf of his principal, except—

(1) When the principal is not disclosed.

(2) When the principal, though disclosed, cannot be sued.

(3) In case the principal is a merchant resident abroad, in a matter of sale or purchase of goods. (Section 230.)

§ 13.—*Dealing with Person not known to be Agent.*

If a person contracts with an agent, not knowing, nor "having reason to suspect," that the person is an agent, (but supposing that he is a principal,) the real principal can require the performance of the contract; but the person dealing has the same

[2] The agent also may renounce his employment, but in this case or in the case of revocation, either party must give reasonable notice if there is an agreement for continued agency, or agency for a time fixed. Compensation may also be due.

rights against him as he would have had against the agent with whom in ignorance he was dealing. This is also subject to the condition that if the real principal is disclosed before the contract is actually fulfilled, the other party may refuse to fulfil, on showing that if he had known who was principal, or if he had known that the agent was *not* principal, he would not have entered into the contract. (Section 231.)

And the real principal, on requiring performance of the contract, can only obtain it subject to all rights and obligations subsisting between the agent and the person in question. (Section 232.)

An example of this in the Act is, that A, who is Rs. 500 in B's debt, sells B rice to the value of Rs. 1,000. Here, of course, B would pay for the rice Rs. 500 only, since he was already owed Rs. 500 by the seller. Meanwhile B has no suspicion that A is not working for himself but for C, who is the real principal. Here C can insist on B's taking the rice (just as A could), *but* subject to the same rights and obligations, *i.e.*, he could not insist on B's paying the whole price without allowing him to set-off A's debt[3].

If the agent is, under any circumstances, personally liable, the person dealing with him has the option of holding either him or the principal, or both, liable[4]. (Section 233.)

§ 14.—*Pretence of being Agent.*

A person untruly representing himself to be an agent is liable to make compensation for any loss, in case the principal for whom he pretended to act does not ratify his acts (section 235), nor can he

[3] The following is a recent case actually decided. P dealt with R and Company as principals, and sold them goods on credit. Before payment R and Company became bankrupt. P then discovered that R and Company had all along been buying as agents for an undisclosed principal D; but D *had in fact paid R and Company* for the goods before their insolvency. Here it was held that P could not recover over again from D, the price of goods supplied to R and Company, after the *bonâ fide* payment by D to them (at a time when P was quite content, and was giving credit to R and Company as principals). But he could hold D liable if he had not yet paid, or had paid improperly.

[4] The example given is that A contracts with B to sell him 130 bales of cotton, and afterwards discovers that B is C's agent; he may sue B or C, or both, for the price of the cotton.

require performance of the contracts on his own account. (Section 236.) Reference should here be made to section 230, in which it is stated that an agent cannot personally enforce contracts, nor is liable on them, except where he does not disclose his principal, or where the principal, though disclosed, cannot be sued. Here we see the difference when the person *pretends* untruly to be an agent. In this case he cannot enforce the contract, but he is liable to compensate any loss consequent on his pretence.

If an agent makes any misrepresentation, or acts fraudulently in respect of matters in the scope of his authority, the misrepresentation or fraud will have the same effect on the contract as if it was the principal's own, but not so in matters not falling within his authority. (Section 238.)

§ 15.—*Forest Officers as Agents for Government.*

Nothing is said in the Act about public servants making contracts as agents for the Government. I have already said something about their powers in this respect. But the rule of law is that a public servant making a contract as such, is not personally liable at all, even under circumstances, which if he were a *private agent*, might make him personally liable. The reasons of this are stated to be, first, that persons who enter into contracts with public servants know that they do not look to them personally at all; next, that if public servants were liable, no one would undertake the office for fear of the risk. It may, however, be shown that a person dealt with a public servant not knowing that he was such, and that there was an intention for personal liability.

Nor do the *admissions* of a Government servant (as agent) bind the Government, unless it clearly appears that they were authorized to make them. Nor can Government officers be held responsible for the neglect of their subordinates[5].

Lastly, I have to observe that I have given no instances in

[5] Secretary of State *versus* Kamachee Boya, 7, Moore's Indian Appeals, 476 and Collector of Masulipatam *versus* Cavaly Vencata Narrainapa, Id, vol. 8, p. 554. See also the chapter on the organization of Forest Service—"Legal Protection of Forest Officers."

which the Government servant as an agent enters into contracts to produce goods or supply them in the future; because under no circumstances should a forest officer enter into such engagements. His only contracts as regard timber and other forest produce should be sales of material in existence and at a certain place.

It is impossible for a forest officer to have that command of his business and of money that a trader has. He should therefore always say, "I expect such and such sleepers or logs (or whatever it is) at such and such a timber station, or to be ready in such and such a time, and I will do my best, but I cannot bind Government that they will be there, either on a certain date or of a certain quality or condition, nor can I make Government liable in possible damages because the material is not produced."

When dealing with a State Railway even, although one department of Government would not claim damages against another, or go to law, still the forest officer should always guard himself against actual promises for the future. He may explain the state of his work, show the Engineers the probability of sleepers, or whatever it is, being in depôt by a certain time, and may, and indeed is bound to, use his utmost effort to supply the public service promptly and according to expectations, but more than that he should never do.

§ 16.—*Dealings with a Firm.*

In the same way as a forest officer may deal with *agents*, he may also deal with *a partner* in a firm or partnership.

The relations of partners among themselves, and of the partners to third parties, form the concluding chapter of the Contract Act. This subject, however, I regard as beyond the scope of this work, but I will mention just those sections which will keep a forest officer from mistake in dealing with a partnership or "firm."

Every partner (and any one consenting to allow himself to be represented as a partner, in case credit is given on the faith of such consent (section 246) is liable for all debts and obligations of the firm existing at the time.

A partner subsequently joining is not liable for what happened before he joined. (Section 249.) And any partner may be called on to make good any loss arising from the neglect or fraud of any member of the firm, in the management of the business of the firm. (Section 250.)

"Each partner who does any act necessary for, or usually done in, carrying on the business of such a partnership as that of which he is a member, binds his co-partners to the same extent as if he were their agent duly appointed for that purpose."

But not if the partners have agreed among themselves as to some restriction, and *notice* is given to persons dealing with them of the restriction, or such persons *know* of the restriction. (Section 251.)

A partner's estate is not liable for debt incurred *after* his decease. (Section 261.)

Persons dealing with a firm are affected by a *dissolution of partnership*, only when *public notice* has been given or where they themselves "had notice" of it. (Section 264.)

SECTION V.—SPECIFIC PERFORMANCE OF CONTRACTS.

§ 1.—*What is meant by the term.*

When a contract is broken, the usual remedy is to claim damages, and the Contract Act under the head of "Consequences of Breach of Contract" speaks only of this remedy, and tells us what sort of damages can be claimed.

But it is obvious that in many cases it is but poor consolation to get money damages; what we want is to have the work done, and it may be quite possible for the contractor to do the work, only he refuses, or neglects, or would like to pay the damages, not so much minding the money loss as being made to do the work. In some cases, therefore, the law will compel a man *specifically* to carry out or *perform* his *contract.*

This is really a sort of contract *procedure* law adjective to the substantive contract law we have just been dealing with, and so it

is kept as a separate subject, and is dealt with in Chapter II of Act I of 1877[6].

Here, following the general plan of this chapter, I shall only notice first such provisions of the Act, as are likely to be wanted by a forest officer, who has a contract for work with a contractor, and does not want money damages, but wants to have *the work itself done.*

§ 2.—*When it can be ordered.*

In general, a decree for this can be obtained—

(1) When no standard exists for ascertaining the money damage caused by non-performance.

(2) When the payment of money would not afford adequate relief.

(3) When it is probable that pecuniary compensation cannot be got.

It is a presumption of law (*which may however be rebutted*) that any contract to transfer *movable* property (*e.g.*, contract for sale of goods or materials) can be adequately relieved by money damages, and that a contract to transfer *immovable* property cannot. (Section 12.)

If there are parts of a contract which are separate and independent, and one part can and ought to be specifically performed, but not the other, a decree may be given for specific performance of the part that can be performed. (Section 16.)

There are other cases where a contract as a whole cannot be performed, and where the part that cannot be performed is either essential or is unimportant; the rules about this are in sections 14-15. Specific performance of *part* of a contract can only be had when either sections 14, 15, or 16 apply. (Section 17.)

§ 3.—*Compensation in the alternative.*

A person asking for specific performance may also ask in his

[6] The "Specific Relief Act." It deals not only with the specific performance of contracts, but also with other orders of Court requiring a *thing* to be done specifically or not done. Hence the more general title.

suit for compensation, either in addition to or as an alternative for specific performance.

If the Court finds that there has been a breach of contract for which compensation is due, and yet specific performance cannot be decreed, it will decree the compensation.

If the Court thinks that besides specific performance some compensation is due for the breach, it may give compensation as well. (Section 19.)

The fact that a penalty or liquidated damages are mentioned in the contract, as payable on default, is no bar to a suit for specific performance. (Section 20.)

§ 4.—*Where Specific Performance cannot be ordered.*

There are some kinds of contracts which are expressly declared (section 21), to be such that specific performance *cannot* be ordered.

The whole section, and its numerous illustrations, may be referred to on occasion; here I shall only allude to those likely to be required in Forest business:

The first follows from what has been already said—

(*a*) A contract will not be specifically enforced where money damages would be an *adequate* relief.

(*b*) A contract, which goes into numerous and minute details, or which is so dependent on personal qualifications or volition of the parties or otherwise from its nature is such that the Court cannot enforce specific performance of its material terms[7].

(*c*) A contract the terms of which the Court cannot find with reasonable certainty.

(*d*) A contract which is in its nature revocable.

(*Example:* A contract to take "as many sleepers up to 10,000 in number as Deputy Conservator A likes to supply.")

* * * * * * *

[7] *Example:* A, a printer, agrees with B, a publisher, to write a novel in three volumes: this cannot be specifically decreed. A contracts to employ B on personal service, or B agrees to render personal service to A.

(*g*) A contract which involves the performance of a *continuous duty* extending over a longer period than *three years* from its date.

A contract to refer a matter to arbitration cannot as such, be specifically denied. The proper course is to act under the Civil Procedure Code.

Specific performance cannot be decreed against a person who has assented to the contract for such grossly inadequate consideration that fraud or unfair advantage appears, nor if he assented consequent on misrepresentation or concealment. This is detailed in section 28, but as it is not likely that the forest officer, as plaintiff, will ever come within its terms, I do not go into further particulars.

§ 5.—*Order for Specific Performance always discretionary.*

A Court is never *bound* to decree specific performance, but must use discretion "guided by judicial principles and capable of correction by a Court of Appeal." (Section 22.) Such discretion may be used where, though there is no actual fraud or misrepresentation, the contract gives plaintiff an unfair advantage, or where it would be very hard on defendant in a way in which he had not foreseen, though the non-performance would inflict no hardship on plaintiff.

The forest officer will also readily understand that he cannot sue for specific performance from a contractor, if he (on behalf of Government) violates, or becomes incapable of performing, any *essential* term of the contract that has *to be performed on his part;* nor if he has already chosen another remedy and obtained satisfaction for the breach of contract. (Section 24.)

If a suit for specific performance is dismissed, it is a bar to another suit for money compensation (section 29); therefore the plaint should always ask for alternative compensation. (See section 19.)

§ 6.—*Suits to rectify a Mistake.*

In some cases suits may be brought to *rectify* written contracts,

where there is a *mutual* mistake, or a fraud, so that the writing does not express their true intention. (See section 31.) There may be a prayer for rectification and for specific performance of contract so rectified, in the same plaint. (Section 34.) And where a person has a right to have a contract *rescinded*, he may sue for rescission, in the cases specified in section 35.

If a person has executed a writing in a contract which is void or voidable, and he has "reasonable apprehension" that the instrument, if left outstanding, may cause him "serious injury," he may apply to the Court to order the instrument to be *delivered up* and *cancelled*. (Section 39.)

CHAPTER XXI.

STAMP AND REGISTRATION LAW.

The General Stamp Act is No. I of 1879. Stamps on instruments are separate altogether from stamps in civil suits or plaints (but not affidavits[1]) or for service of process; the latter are all called "Court fees," and always affixable by adhesive labels and are governed by the Court Fees Act (VII of 1870); (see the chapter on Civil Procedure).

SECTION I.—THE STAMP ACT.

§ 1.—*Form of Stamp.*

In the first place the document must be written on paper bearing the impressed stamp, unless there is some special rule or provision of the law allowing adhesive labels.

And I may mention that only for receipts and cheques and documents requiring one-anna stamp may adhesive stamps be used, as well as for bills of exchange in some cases, entry of Advocates, &c., on the roll of the High Court, notarial acts and share transfers; so that if a stamp is required at all in a contract made by a forest officer, it will always be an impressed stamp (Stamp Act, sections 9-10); a document is held to be *unstamped* if it does not bear the proper form of stamp. (Section 14.)

§ 2.—*Adjudication in case of doubt.*

It is only in cases where the person making the document has doubts about the proper stamp that the contract can be written on plain paper and taken to the Collector, under section 30, to have the stamp adjudicated; then the Collector will endorse the amount

[1] These are under Act I of 1879, and, except in the cases exempt, are to be written on a one-rupee stamp sheet.

ordered to be paid and duly paid, and this instrument is equivalent to a stamp.

In other cases a sheet of paper bearing the proper engraved stamp must be used.

§ 3.—*Use of several Sheets, or several Stamps.*

If there is no possibility of getting one stamp of the required value, the *local provincial* rules must be referred to as to the number of stamps that may be employed.

There is nothing to prevent a lengthy document that will not go into the stamp paper being written partly on the stamp and partly on annexed sheets of plain paper, but the signatures or mark, of the persons executing, and the witnesses to those signatures have to be made on the sheet (or on each sheet if several) so annexed.

In writing on a stamp sheet, it is only on the front side bearing the stamp that the document should be written. (See section 12.)

§ 4.—*Government Contracts may not require Stamp.*

But I do not know of any written *contract* which, if executed between Government and a contractor, *need require a stamp;* for by section 29 it is always competent to all parties to a contract to agree between themselves which shall bear the stamp; and as by Schedule II (section 18) "any instrument executed by or on behalf of or in favour of Government in cases where, but for this exemption, the Government would be liable to pay the duty" chargeable in respect of such instrument is exempt, it is always optional with the forest officer to insert in his contract a clause stating that "it is agreed between the parties hereto that the stamp duty shall be borne by the Government," or words to that effect; and the Government will then be liable for the duty, and consequently be exempt, and the document will need no stamp.

§ 5.—*Receipts.*

When a forest officer takes receipts from persons to whom he has made payments over Rs. 20 in value, he should see that a proper one-anna *receipt label* is attached, and is cancelled so that it cannot be used again. (See section 11.)

§ 6.—*Impounding Unstamped Documents.*

It must be remembered that the law (section 33) imposes on every person in charge of a *public* office (except a Police officer) the duty of "impounding" any instrument which, in his opinion, ought to bear a stamp, and which is "produced or comes" before him in the performance of his official functions.

I think there is no doubt that a forest officer who has a public office is within the meaning of this section: but in any case of doubt it rests with the Local Government to determine who, for the purposes of this section, is deemed to be "in charge of a public office."

The officer in charge has to send the offending instrument to the Collector *in original*, under section 36; the Collector does all the rest.

SECTION II.—REGISTRATION.

§ 1.—*Principle of the Law.*

The Registration Act is No. III of 1877. The general principle is that some documents *may* be registered, others *must*.

The latter are specified in section 17, the former in 18.

It will be observed that the Registration Act has nothing to do with the question whether there *must be a writing or document at all.*

We have seen that, under the Contract law, no contract need be in writing unless there is some express provision of law that it is so. And I am not aware of any *law* which prescribes that any contract, likely to be within a forest officer's business, *must* be in writing[2]; except sales and mortgages of land or houses under certain circumstances.

The Registration Act is only concerned with the fact that *if* there is a document, then that document *must* be registered in

[2] As I before remarked (but it is often useful to repeat things) Government or the Conservator may of course make it a rule of practice that contracts are to be in writing, but that would have nothing to do with the actual *legal validity* of the contract.

certain cases, and *may* be registered in certain others; and that in either case certain legal effects follow from registration or non-registration of documents that *must* be registered as described in section 17 will be found all of them to relate to *immovable* property—to gifts or sales or leases or the creation or extinction of some interest in immovable property, or to the acknowledging of payment of consideration in respect of such transactions.

§ 2.—*Government Deeds exempt.*

These provisions do not apply to Government deeds. Any grant of immovable property by *Government* is exempt. No documents made to be put on the record of local revenue settlements or local survey, nor documents filed periodically by patwáris, &c., in Revenue offices, nor sanads or documents evidencing grants or assignments of land or interest in it by Government, require registration. (Section 90.) In many cases, however, for greater security, registration of a contract is thought desirable. I shall simply describe the leading provisions of the law which will require attention.

§ 3.—*Effects of Registration.*

And first I may mention—

That no registration gives any effect to a fraudulent or collusive document, nor will it make binding a contract which is void or voidable (except in the case of a contract without consideration).

That the registration does not afford *conclusive* proof of execution.

Nor of receipt of consideration, even though this is stated before the Registering officer to be a fact; but the strongest proof would be required to contradict the evidence afforded by this fact.

A document (not being a will) if duly registered and relating to any property, movable or immovable, will take effect against any oral agreement or declaration regarding such property, but *not* where there has been an *oral agreement accompanied* or *followed* by *actual*

delivery of possession. (Section 48[3].) But documents under section 17 (clauses *a, b, c, d,*) and section 18 (clauses *a, b,*) *if registered* have priority over unregistered documents (not being decrees or orders of Court) relating to the same property. (Section 50.) If a document exists, and ought to have been registered under section 17, it is not only no evidence in a Civil Court, but has no effect on the rights in the property whatever. (Section 49.) This does not apply to documents of this kind granted by Government. (Section 90.)

§ 4.—*Rules for describing Property.*

Care must be taken that where any houses or lands are dealt with in a document, the terms of section 21 as regards description, specification of position and boundaries, are attended to. Whenever forest officers have occasion to execute or be parties to security or other bonds dealing with land or house property (though I strongly recommend them to avoid having anything to do with land and houses as security), these conditions must be carefully looked to.

§ 5.—*Method of Registration.*

Deeds presented for registration are copied by the Registration office into books, and the deed is left (a receipt being given for it (section 52) for the purpose. Afterwards the deed is returned with a receipt for the *fees*. The office does not, however, copy plans or maps. When therefore a deed is accompanied by such, two copies should be prepared, one to be attached to the deed, the other to *be left in* the Registration office.

§ 6.—*Erasures and Alterations.*

Erasures and interlineations may give ground for a refusal to register unless attested by initials of the person executing the document. (See section 20.)

§ 7.—*Time for Registration.*

Documents to be registered should be presented within *four months*

[3] Section 48 has been modified in effect, in provinces where the Transfer of Property Act is in force (North-Western Provinces and Bengal and Central Provinces for example). There cannot be an oral sale and mortgage in some cases. See Act, sections 54, 59.

from date of execution. (Section 23.) After that, registration may be allowed, within another four months (on payment of a heavy penalty) in cases where necessity or unavoidable accident are shown to have prevented the registration.

§ 8.—*Place.*

The proper office is the office of the Sub-registrar, within whose sub-district the whole or part of the property is situate (section 28); or if there is no property in question, at the office of the sub-district within which the document was executed, or in which *all* the parties agree to have it registered. (Section 29.) It is in the discretion of a *Registrar* to register a document that might have been registered by the Sub-registrar. (Section 30.) A Registrar of a district, including a Presidency town, and the Registrar of Lahore, can register without respect to the place where the property is, as long as it is in British India. If it is necessary to register a deed relating to property in one district, and neither party is there, they can execute a *special* "power of attorney to register" (section 33) before the Sub-registrar in whose jurisdiction they reside, and then send the agent so appointed to register for them.

The provisions about appearance, or a special agent for a person who cannot appear in person, do not apply (section 88) to "any officer of Government in any proceeding connected with the registration of any instrument executed by him in his official capacity," nor need he endorse the document as executant under section 58.

All the Registering officer has to do is to satisfy himself that the execution by the Government Officer is a fact, for which purpose he may refer to the officer or to any Secretary to Government, &c.

§ 9.—*Persons presenting.*

Ordinarily (section 32), the person *executing*, or the person *claiming under* a document (or his representative or assign, if he is dead or bankrupt), or an agent (holding *a special power of attorney to register*, attested before the Sub-registrar of the place where the principal resides (section 33) may present a document for registration.

§ 10.—*Procedure.*

The form of registration and endorsement is given in sections 51-6. The fees are regulated by rules issued by the Local Government.

The section 71 *et seq.* deal with cases in which the Sub-registrar may refuse to register, and the appeal there is from his order refusing. No such appeal lies where he refuses because execution is denied. (Section 72). In this case there is a special proceeding before the Registrar to enquire into the fact (sections 73-5), and the ultimate remedy, if the Registrar does not order registration, is (under section 77) to file a civil suit for a decree ordering registration.

I may mention that if any money is paid, or goods delivered, in the presence of the Sub-registrar, or an admission made in his presence that the money has been paid, this is recorded[4].

The endorsement of registration is to be both signed and stamped with the official seal of the registering officer. (Section 60.)

The books kept by Registering officers are known as No. 1 and No. 2[5], and the indexes of No. 1 are open to search or inspection on payment of prescribed fees. (Section 57.)

[4] But is not *conclusive.* Nor is it *conclusive* that the admission of receipt is recorded in the deed itself.

[5] No. 1 contains copies of all documents registered not being wills or authorities to adopt; No. 2, record of reasons for refusal to register.

CHAPTER XXII.

CIVIL PROCEDURE.

Under the present Forest law, Forest Officers will have much less chance of having to bring or defend suits in the Civil Court than formerly.

There were in early days many sums due on sales of forest produce which could only be recovered by civil suits: but now all money payable under the Forest Act or Rules can be recovered (section 81, Forest Act) without a suit, as an arrear of land revenue through the Collector.

Moreover most forest produce is paid for at the time, and if not, under section 82 the price of it is a first charge on the produce which may be taken charge of by a forest officer, and ultimately sold, if need be to realise the sum due.

Nor is a forest officer liable to a civil suit for anything done by him under the Act. (Section 73.) If such a suit is brought this section would be a good defence[1].

Still there may be public suits in which a forest officer may be interested. There may, for example, be disputes about Government contracts, which have to be referred to arbitration or settled in Court. Claims may be brought against Government for land, as in the well known "North Kanara case." And it is possible that in matters of lesser importance, where the Government advocates cannot be employed, or there is no Government pleader, a Forest officer may have to appear on behalf of the Department himself. But even where this is not so, he may have to prepare cases and advise the law officers, so that an elementary acquaintance with the general features of civil procedure may be useful to him.

[1] See Chapter XIX on the legal position of Forest Officers.

Just as the Criminal Procedure law, of which we have just completed a survey, declared the constitution and fixed the jurisdiction of the Criminal Courts and regulated their procedure on trials and the execution of the sentences of the Court, so the Civil Procedure Code deals with the civil suit, the place at which it is heard, and the procedure on trial and the execution of the decree or judgment. But the Procedure Code does not itself constitute the classes of Civil Courts as the Criminal Procedure Code does for the Criminal Courts.

SECTION I.—THE CIVIL COURTS.

The Code[2] contemplates the division of the provinces into districts, and takes it for granted that in each district there is a principal Court of original jurisdiction (called "the District Court"), as well as Subordinate Courts of different grades for the trial of suits in that local jurisdiction. All such Courts are subordinate to the District Court and to the High Court[3].

The High Courts of Bengal, the North-Western Provinces, Bombay and Madras are constituted under Acts of Parliament and Royal Charters. The Chief Court in the Panjab has its authority under Act XVII of 1877. In other provinces there are Judicial Commissioners, *e.g.*, in Oudh, the Central Provinces, and Burma, under the Civil Court Acts of these Provinces (Act XIV of 1865 for Central Provinces, Act XVII of 1875 for Burma, Act XIII of 1879 for Oudh). All these, in their respective provinces, are the "High Courts" for the purposes of supervision and appeal.

The District and Subordinate Courts are also constituted by various Acts; those in Bengal and North-Western Provinces under

[2] The Code is Act XIV of 1882, which came into force on 1st June 1882. This Act is in fact only a revised edition (with slight alterations) of the preceding Code Act X of 1877 as amended by Act XII of 1879. As in the chapter on Criminal Procedure, the student is expected to consult the Code itself: these chapters are *guides* to the Code but do not supersede a study of the Codes themselves.

[3] Some of the High Courts have an original civil jurisdiction: they are then the "District Court" for the local limits of that original jurisdiction.

Act VI of 1871, the Panjab under Act XVII of 1877, those in Oudh, Burma, and Central Provinces under the Acts already named[4]. While, however, in Regulation Provinces the High Court comes immediately above the District Judge, in the Non-Regulation Provinces, the Courts Act recognizes an intermediate appellate and supervising grade—the Courts of Commissioners.

The District Judge can hear civil suits arising in his jurisdiction, as specified in the Procedure Code, on all subjects and to any value. This will be found to be the case under all the laws.

In *Bengal and the North-Western Provinces* Subordinate Judges have similar powers, and Munsifs can hear all classes of cases provided their money value does not exceed Rs. 1,000. (Act VI of 1871, sections 19-20.)

In *Oudh* the Subordinate Judge, though his jurisdiction is not limited as to class of cases, is limited as to value of suit to Rs. 10,000 (Act XIII of 1879, section 16); the Munsif is similarly limited to Rs. 500, unless special jurisdiction up to Rs. 1,000 has been conferred.

In the *Panjab* the "Subordinate Judges" are represented by Assistant Commissioners[5], and they may have "full powers," "special powers," or "ordinary powers" which represent a limit as to pecuniary value of suits cognizable by them, of Rs. 10,000, 500, and 100 respectively. The lowest Courts, those of Munsifs and Tahsildars (section 3, Act XVII of 1877) are in two grades having powers

[4] There are also special arrangements made for certain localities. In Berar the Courts exist under the orders of the Governor-General and resemble those in Non-Regulation Provinces. In Ajmer there is a Courts Regulation under the 33, Vic. cap. 3, Reg. I of 1877; in Assam (including Cachar) the powers of Courts are given under section 10, Act VI of 1871; and in Sylhet as in Bengal Proper. In Coorg the Courts are under Act XXV of 1868. The Jhansi Division of the North-Western Provinces and the Tarai district have Courts of their own; see Act XVIII of 1867 and Regulation IV of 1876. So has Arracan (Regulations VIII of 1874 and V of 1876). In some localities special subjects (as *e.g.* in Bhutan Dwárs by Act XVI of 1869) are excluded from the ordinary Civil Courts, and in most of the Land Revenue Acts a number of subjects are reserved to the Revenue Courts. (See my Revenue Manual on this subject.)

[5] Those appointed as *Judicial* Assistants, have powers as "District Judges."

limited (according to value as usual) to suits of Rs. 300 and Rs. 50 respectively.

In *Burma* the *powers* are shown in a convenient form in a table at section 12 of the Courts Act, and as it can easily be turned to I will not reproduce it here.

In the *Central Provinces* there is a gradation not dissimilar to that of Panjab. The District Court (the Deputy Commissioner's) can hear all suits without limit and has also appellate powers: the Subordinate Courts are the Assistant Commissioner's of 1st, 2nd and 3rd class, with powers up to Rs. 5,000, Rs. 1,000 and Rs. 500 respectively. There are two grades of "Tahsildar's Courts" as in Panjab, but with powers to Rs. 300 and Rs. 100 respectively.

§ 1.—*General view of the Courts.*

Thus, while in every province, and even in special districts of provinces, the student, desirous of knowing the precise details of the Courts, must consult the local Act, or the Regulation or special Rules which affect the locality, and while it would swell the bulk of this book beyond any possible limits to reprint a collection of such detailed rules, it is not difficult to understand the general scheme on which the Civil Courts are constituted.

In every district there is a District Court (the District Judge, or in Non-Regulation Provinces the Deputy Commissioner or a Judicial Assistant Commissioner who relieves him of the civil work) having unlimited original powers and appellate powers over Subordinate Courts.

In the Regulation Provinces all appeals from the District Courts go to the High Court; in the Non-Regulation Provinces such appeals lie, as a rule, to the Commissioner's Court, from which again an appeal lies to the Chief Court or Judicial Commissioner, &c., under certain rules.

After the District Court, the next Courts are the Subordinate Judges in the Regulation Provinces. There is no value limit, but an appeal first lies to the District Judge. In the Non-Regulation Provinces these Courts are represented by the Assistant and (Extra

Assistant) Commissioners' Courts, in grades, each grade known by the value limit of its jurisdiction. Appeals from the first grade are to the Commissioner, the others to the District Court.

Below these come, in Regulation Provinces, the Courts of Munsifs, and in Non-Regulation Provinces the Courts of Munsifs and of Tahsildars, with limited powers and in two grades.

There may be Small Cause Courts under a special Act, with power of summary trial and no appeal. Military Courts of Request are also separate.

The appellate jurisdiction here generally indicated will be considered more in detail at a later stage.

SECTION II.—THE CIVIL SUIT.

§ 1.—*Where the Suit is filed.*

The Procedure Code rules, regarding the institution of suits in the various C ourts, may now be considered. The general rule is (section 15) that every suit must be instituted in the Court of the lowest grade competent to try it. As this might, however, cause an undue influx of work into certain Courts the local Acts usually give powers to the District Court to distribute work.

Under section 25 of the Code also, the High Court and the District Court have special powers of withdrawing cases from Subordinate Courts and hearing them themselves, or referring them for hearing to any other Courts in their jurisdiction.

§ 2.—*With reference to Locality.*

As regards *locality* (subject to the general rule in section 15), suits for immovable property, or for compensation for damage to immovable property, and for movable property under attachment or distraint, must be brought in the Court within whose local jurisdiction the property is situate. (Section 16.)

And in all other suits the action is brought (section 17)—

(*a*) when the *cause of action arises ;*

(*b*) or where *all* the defendants, at the time of commencement of the suit, actually and voluntarily reside (not where

they are in prison or unlawfully detained, *e.g.*) or carry on business, or personally work for gain;

(*c*) or where one or more of the defendants so resides, &c., and the other defendants either acquiesce, or the Court gives leave.

If a person permanently dwells at one place and has a temporary lodging at another, he is held to dwell at both places in respect of any cause of action arising at the place where he has a temporary residence.

If a Company or Corporation has a sole or principal office in British India, and also subordinate places of business, it dwells at the former, except in cases arising at the latter place, where, for the purposes of a suit, it is held to reside also at the latter.

The illustrations to the section (17) in the Code should be studied.

In cases in which *immovable* property is situated all in one district, but still in the jurisdiction of different Courts, or if it is in different districts, in cases in which a suit is capable of being brought in either of the Courts, and the defendants can show cause for its being tried in another Court, the sections 19 to 24 may be consulted. These details need not be given in the text.

§ 3.—*Several Plaintiffs and Defendants.*

The Code now goes on to consider the questions that arise in the very common case of there being several plaintiffs and several defendants. All may not have the same degree of interest, or the same degree of responsibility, yet in some cases it is right that they should be joined in the same suit, and in others it is necessary that the suit should be separate. Plaintiffs may very generally be joined (section 26), and an error in suing the right plaintiff may be amended by leave of the Court (section 27), so all defendants may be joined (section 28). It is a preliminary question (section 32) to settle whether particular parties have been rightly or wrongly included. No person can be added as a *plaintiff* or next friend of a plaintiff without his consent.

Any person can *apply* to be made a party on either side as the case may be.

All questions of this nature are to be taken up at the *earliest opportunity*, and *must* be so before the first hearing of the actual issues. They are held to be *waived* if not so taken. (Section 34.)

§ 4.—*Appearance by Agent.*

"Recognized agents" and pleaders (under the Legal Practitioners' Act of 1879) can always appear for the parties, but the Court can order a personal appearance (Section 36.)

"Recognized agent" is defined by section 37. I shall not go into details on the subject, but merely remark that service of Court processes on the recognized agent is in all cases (unless the Court otherwise orders) equivalent to service on the principal. Processes served on the *pleader shall* be *presumed* to be duly communicated to the principal, and (in the absence of a contrary order of Court) shall be as effectual as personal service. (Section 40.)

Pleaders and others, but not Advocates of any High Court must file written authorities. (Section 39).

In case Government is a party or Government has to be served with a civil process, there are special rules, and I shall reserve the details to a special section on Government suits, and meanwhile go on so as not to break the thread of the description with the proceedings in a suit.

§ 5.—*Terms used in Civil Cases.*

The student will observe that we use different terms in civil and in criminal cases. A criminal case is a *suit*, and the trial is on the '*issues*' or points in dispute, the parties are *plaintiff* and *defendant*. In criminal matters we have a 'case,' the parties are the "prosecutor" or "complainant" (according as the case is a warrant or police or a summons case on complaint) and the "accused" or "prisoner," and the trial is on the "charge" or "complaint."

In official and other reports and correspondence, these terms should always be correctly used and distinguished.

SECTION III.—THE FRAME OF THE SUIT.

§ 6.—*Joining Causes of Action, &c.*

I shall omit all details on this subject (sections 42-7) because on such points the forest officer will always need legal advice. The object is to get a final settlement of the matters in dispute and prevent litigation going on. It is, therefore, necessary not to sue for a part of what is wanted, but the whole; and if a part is only sued for the rest cannot afterwards be claimed: so several remedies may be claimable on one cause of action; all must be asked for if all are wanted, otherwise the remainder cannot separately be claimed.

A familiar instance of this is the case where *rent* for several years is due. Supposing rent for 1879 and 1880 are due, if you only sue for 1880 you cannot afterwards claim for 1879.

It is also likely that a forest officer's suit may be brought, say, against a clerk who has given security for the due discharge of his duty, and has been guilty of some misconduct for which he is civilly liable. Here it is always necessary to sue both the principal *and* his sureties at once.

It sometimes happens that *several* complaints arise against one individual, or several connected in one business or interest, and it is a question whether these separate causes of action should be joined in one suit or in separate suits: this is determined by sections 44-7, and details will not be given; proper advice must be sought: but I may state that the general rule is that if a claim is to immovable property, that cannot be joined with a separate claim on a money debt; it must be kept separate except as regards subsidiary claims to the profits (called "mesne profits"), which might have been had from the property in dispute, out of which plaintiff has been wrongfully kept, and damages arising out of a breach of contract under which the property is held.

But if you have several causes of action against the defendant in the same character (*i.e.*, not where one sum is due from him as executor to an estate, and another from him personally, irrespec-

tive of the estate), you can join them in one suit; but the Court is at liberty to make orders as to separate trial for convenience sake.

§ 7.—*The Plaint.*

Having then understood clearly in what Court you are about to sue, and whether you have rightly put together the claims (if more than one) or separated them, and rightly put together or separated your defendants, the next thing is to draw up a *plaint;* for every suit is commenced by filing in Court a *plaint in writing.*

The contents and form of plaint are clearly set out in section 50, and no comment is needed. The signature and certificate or verification declaring that the plaint is just and true, are also explained, and who is entitled to make the verification when the actual client does not make it himself from his own personal knowledge.

There are also forms of plaint on almost every conceivable subject of a civil suit, given in the schedule at the end of the Code.

I may mention that no question can now arise about limitation; if the suit is brought after the period allowed by the Limitation law (Act XV of 1877), the Court will reject it, whether defendant takes this ground for objection or not. If, therefore, the suit is *primâ facie* barred, but there are some of the recognized exceptions saving the limit, these must be clearly stated in the plaint.

In some cases plaints wrongly drawn will be rejected, but the law allows in other cases, that the plaint should be *amended* (section 53,) or it may in some cases be *returned* (section 57), if the objection is to the jurisdiction of the Court in respect of value, or locality. With the plaint, a copy (or concise statement may be substituted by permission) is filed, to be given to the defendant with the summons. (Section 58.)

§ 8.—*Documents on which the Plaint is based.*

Documents on which the suit is based must be filed with the plaint, which is done by filing a copy and producing the original in Court. If the documents are not in the plaintiff's power, he must give in a list with the plaint; and if he relies on documents to

prove his case, which it is not necessary to file with the plaint itself, a list of them must be annexed. (Section 59.)

Bulky documents, like account books, are produced in Court, and a copy of the necessary entries or pages filed with the plaint The Court will compare the copy with the original, and having marked the documents or the entries for "identification" will return them. (Section 62.)

It is necessary to attend to this, because though documents the *necessity of which as evidence only appears in consequence* of something which comes out in the course of the trial, can be produced when necessity arises, documents which form the *foundatiom of the claim*, if not produced at first, can only be produced afterwards *by the permission* of the Court. (Section 63.)

SECTION IV.—THE FIRST STEPS IN A SUIT.

§ 9.—*Summons to Defendant.*

The plaint being filed and registered by the Court, the next thing is to obtain the attendance of the defendant or his agent, as before stated.

The summons is to be accompanied by a copy of the plaint, or a concise statement of the case if the plaint is lengthy (section 58) one for each defendant.

The summons *may* require the *personal* attendance of the defendant, but *not*, if he resides beyond the local limits of the Court's ordinary original jurisdiction, at a distance of 50 miles from the Court (or 200 miles by rail, supposing railway communication to exist for five-sixths of the distance). (Section 67.)

Every summons must specify whether on appearance, the suit will be heard to *final disposal*, or merely for a preliminary hearing, with the object of settling the issues, or determining the preliminary points on which the parties differ, and on which the judgment will be in the end given.

Petty suits that can *primâ facie* be disposed of at once will be for "final hearing" as is the invariable practice in all Small Cause Court cases. (Section 68.)

When a summons is for "final hearing" it will direct the defendant to *produce his witnesses,* so that he must be prepared to bring them, or apply for summons beforehand.

In all cases the summons directs the defendant to produce any documents on which *he* relies for his defence, or any document mentioned which the plaintiff requires him to produce as being in his possession or power.

§ 10.—*Service of the Summons.*

This is effected by tendering the copy and the copy of plaint. It is served on the person unless there be an agent, or on the manager or agent of a branch business when the principal office is elsewhere. (Section 76). If this fails, service is made on any adult male member of the defendant's family who is residing with him; but not on a *servant.* (Section 78.)

The recipient is required to sign the original summons on receiving the copy. If this is *refused* or if there is no agent or no member of the family, the copy of the summons is affixed to the outer door of the house. On the original is endorsed the manner, time, &c., of service. If the Court thinks the defendant is keeping out of the way to avoid service, then a copy is affixed at the Court-house, and another on the house where the defendant is known to have last resided, and this "substituted" service, as it is called, is legally effectual. (Section 83.)

For further details as to service of summons from the "Mufassal" inside Presidency towns, for service on a prisoner in jail, for service by post, or in foreign territory where there is a Resident or Political Agent, and where a summons may be served on persons of rank in *form* of a *letter,* and the cost of postage, &c., I shall leave the student to consult sections 85-95 as occasion requires.

Court fees for service are always payable in the form of adhesive stamps, whether by Government or any private party, under the Court Fees Act. I shall give a *note* on the Court Fees Act at the end of this chapter.

§ 11.—*Appearance of Parties—Consequence of Non-appearance.*

If the plaintiff has been in fault by not paying the fees, and the summons has not been served, and so the defendant does not appear, the suit *may* be dismissed[6]. (Section 96; see also section 99.)

If neither party appear, the suit *shall* be dismissed unless it is especially ordered, for reasons to be recorded by the Judge himself, otherwise. (Section 98.)

If the defendant does not appear, and the plaintiff does, and it is proved that the summons was served, the Court may proceed *ex parte*; but if service is not proved the Court *shall* issue a second summons (and *may* if there is any sort of doubt); and if service is proved, but it appears there is not sufficient time for him to appear, the hearing *shall* be postponed. If the plaintiff cannot find the defendant, see section 99A.

When a case is heard *ex parte*, there is a special procedure by which the defendant may appear, show cause for his absence, and get the *ex parte* order set aside, and the case gone on with on the merits. (Sections 108-9.) A Judge is not bound to decree a case *ex parte* without being satisfied that the claim is true, as far as he can judge without hearing the defence.

If the defendant appears and the plaintiff does not, the suit will be dismissed unless the defendant admits the claim wholly or partly, when a decree will be given accordingly. The plaintiff may, however, appear and show cause, and get this order set aside. (Sections 102-3.)

In the case of several plaintiffs or several defendants and some of them appearing, see sections 105-6.

§ 12.—*Written Statements and Set-off.*

Supposing the parties to be before the Court, *written statements* may be put in *at or before the* first hearing, and not otherwise, unless in some cases it is permitted by the Court under section 111.

[6] But, there will be power to file a new suit, and under certain conditions to obtain an order of re admitting his original suit. (Section 99.)

Written statements must be signed and verified like plaints. They must not be *prolix, argumentative* or contain *irrelevant* matter, and must be in clear numbered paragraphs. (See sections 114-6.)

A "set-off" is where the defendant has some claim which he is allowed to plead and prove as something that either completely or partly counterbalances the plaintiff's claim against him.

The details of the law of set-off cannot be here given, and in any necessary case legal advice must be obtained. A number of illustrations are, however, given in section 111.

§ 13.—*Examination of the Party.*

After this the *examination of the parties* by the Court proceeds, unless the case is admitted. The Court examines, but the parties may suggest questions. In case the pleader (being present and not his principal) cannot answer, section 120 explains what is to be done.

§ 14.—*Production of Documents.*

I have already alluded to the rule which requires the plaintiff to file with his plaint, and the defendant to bring, consequent on his summons, the documents which *directly* form the *basis* of the claim or the defence; and it is further the duty of the parties to give notice to produce or bring with them on their own side, all documents that are likely to be wanted for the trial at any stage: and section 138 requires this to be done at or before the first hearing. No documentary evidence which could have been so got ready will be afterwards received without special reason and permission given. The details of all such production, and of notice by one party to produce, will be found in sections 129-36 of the Code.

Records of other cases may be always sent for by the Court. (Section 37.)

The Court may impound and require to keep in custody any document under section 143. This is usually done where there is some fraud or suspected falsity, or when the Stamp law is evaded, &c.

The *return* of documents when done with, is provided for by section 144, but *no document* can be claimed back which by *force of the decree* has become *void or useless.*

§. 15.—*Settlement of Issues.*

Where the suit is not of the simple character which admits of its being disposed of at once, the parties appear *to settle the issues*, that is to enable the Judge to put down in his record of the case, the points of *law*, or of *fact* (separately), on which the parties after full questioning appear really to be in dispute about: the careful performance of this duty is not only essential, but is particularly difficult with native suitors, who rarely disclose the real case till it comes out by patient questioning.

The parties may (section 150) agree on issues and submit a list of them to be decided by the Court.

In *other* cases the Court may always, at any time before decree, amend the issues or add others, or strike out wrong ones. (Section 149.)

§ 16.—*Adjournments.*

There is no limit to *adjournments* beyond what the permission of the Courts, based on considerations of convenience and justice, require. Either party may apply for, and on cause shown may get, an adjournment by permission of the Court, which may impose such terms as to *costs* as it thinks right. (Section 156).

§ 17.—*Attendance of Witnesses.*

Directly a summons for defendant is out, the machinery of the law has been fairly set in motion and an application for a summons to a witness may at once be made. With the application the necessary sum for expenses of travelling to and from the Court, and for maintenance for one day there, must be deposited. This sum must be offered to the witness at time of serving the summons on him[7]. (Sections 160-1.)

[7] As to insufficiency of the sum, and further expenses for detention of witness beyond one day at Court, see section 162.

Summons are served on witnesses just as they are on defendants. Reasonable time must always be given to the witness *to prepare and to travel* to Court. (Section 167). If a witness absents or keeps out of the way, the remedy is, after formal legal examination of the process served on oath (or affirmation) as to the fact of service, to issue a *proclamation* (section 168), and this if unsuccessful may be followed by an *attachment* of property of all kinds not exceeding the value of costs and of a fine imposable (not exceeding Rs. 500) under Section 170.

If the witness appears and gives good cause for non-appearance, the attachment may be withdrawn. (Section 169.) If he does not appear he may be condemned (*in contumaciam*), and if he does appear but fails to show cause, he may also be condemned to a fine suitable to his condition in life and to all the circumstances of the case, and never exceeding Rs. 500, and if this is not paid the attached property may be sold for its recovery. (Section 170.)

The Court may summon witnesses of its own motion, when, consistently with the law of evidence, it thinks necessary. (Section 171.)

A person who fails to attend as a witness may be *arrested* and brought before the Court, if the Court sees reason to believe that he has no lawful excuse. When so brought up he may be fined for his neglect if he had no lawful excuse for his absence. It is to be remembered that non-tender of the witnesses' *expenses is* a lawful excuse. (Section 174.)

It is also to be remembered that persons residing at a distance from Courts, already specified in the case of defendants, *cannot* be required to attend as *witnesses personally*. They must be examined by *Commission*. (Section 176.)

§ 18.—*Commissions.*

A Commission to examine an absent witness, which I will here dispose of, means simply a written direction addressed to *any* person *within* the local jurisdiction of the Court (section 385), or

to a proper Court *outside* its jurisdiction (section 386), to examine either orally[8] or on certain written questions :—

(*a*) A witness who cannot be compelled to attend, as just stated, or in *any* case if the witness is beyond its local jurisdiction ;

(*b*) Persons about to leave the limit of the jurisdiction before the date of trial ;

(*c*) Civil and Military Officers of Government, who in the Court's opinion cannot attend personally without detriment to the public service.

There are certain conditions attached to the actual use of the reply to the Commission when received, which must be borne in mind and are found in section 390.

A Court may permit certain points (usually those of a formal nature, and which are not likely to be the subject of contention) to be proved by a written deposition or *affidavit*, without the personal attendance of the deponent.

SECTION V.—HEARING AND JUDGMENT.

§ 19.—*Procedure at Trial.*

I now return to the direct course of proceeding on a civil trial of the full or detailed kind. Smaller cases, when the dispute is of a simple kind, are (as I said) disposed of at first hearing, when the issues, which usually appear at once, are set down, witnesses heard, and a judgment given under Chapter XII of the Code. (See sections 152 and 155.)

In a detailed hearing, the plaintiff begins by stating his case and producing his evidence.

The "right to begin" is a matter of law, which need not trouble the student. In the great majority of cases it is the plaintiff who begins, unless the defendant admits the plaintiff's facts, but

[8] In which case, of course, representatives of the parties will attend *in loco* to examine and cross-examine, and the Court executing the Commission will take down what is answered.

contends either that, on a right view of the law, the plaintiff cannot succeed, or else that there are some other facts alleged by him which show that plaintiff is not entitled to the relief he seeks. In this case, as would naturally follow, the defendant begins. Whoever begins, has the right, at the close of the whole case, to 'reply,' that is, to have the last word in argument before the Court decides.

When the party who begins has stated his case and produced his evidence, the other party states his case and produces *his* evidence.

Where there are several issues and the burden of proof of some of them is with plaintiff and on others by the defendant, the rule of proceeding is given in section 180.

§ 20.—*Record of Evidence.*

Evidence in a civil case is taken in the presence and under personal direction, of the Judge. In cases where there is an appeal it is taken down in full, in narrative form, and must be read over to witness in presence of all concerned, and the Judge must sign it. (Section 182). The Judge makes himself a memorandum of the subsistence of the evidnece as it goes on, and may add remarks as to the demeanour of the witness, &c. (Section 188.)

The Judge may take down particular questions and answers either of his own motion or on request. (Section 186.)

If there is no appeal, a memorandum of the substance only, is recorded. (Section 189.)

There is a special provision for recording the evidence of any witness about to leave the jurisdiction of the Court immediately, and without waiting to call him at the ordinary time during the progress of the trial. (Section 192.)

§ 21.—*Evidence by Affidavit.*

I have already alluded to the fact that any Court may for "sufficient reason" order that any particular fact or facts may be proved by affidavit.

This enables a great deal of formal evidence to be produced

without trouble and delay. It is a condition, however, that this process of *affidavit* shall *not* be adopted, if it appears to the Court—

(*a*) that either side *bonâ fide* desires to cross-examine ;

(*b*) that the witness himself "can be produced."

Affidavits must state facts known to deponent (not hearsay) ; in certain cases only (which the student need not trouble himself with) may the deponent's belief and the grounds of it be stated. Affidavits that offend against this rule are liable to the penalty that the party producing bears the costs.

Affidavits are made on oath before any Magistrate or Court or any officer appointed by a High Court or local Government (Sections 194-7), and require a stamp under Act I of 1879, not a court-fee stamp.

§ 22.—*Judgment and Decree.*

When the case is closed, the Court delivers judgment. The judgment is written in the vernacular of the Judge and is translated into the language of the Courts. (See section 573.)

The judgment sets out the facts on the issues and the reasons for it. Besides the judgment a formal *decree* is signed, which is usually in a printed form, and sets out the precise relief granted by the Court, and what is to be done or paid by either party, and how the costs, and to what amount, are to be paid by either party.

§ 23.—*Costs.*

The only rule which I shall here allude to is that costs of applications during the proceedings may either be given by order at once to either party, or reserved for consideration to the end or any other stage of the proceedings. Whenever the order about costs does not follow the event of the application or suit, the reasons must be recorded (*i.e.*, if costs are given to the party who gains the case, that is the usual thing and no reason for such an order is necessary, but, should the Court decree the claim, but refuse to allow plaintiff's costs, the special reasons for this must be stated.

The Court has, both as regards costs of applications, and the general costs (Court and process fees and pleaders' fees) of the suit in all cases, full power to apportion them as it thinks right. And I may add that costs being part of the decree, there is an appeal on the subject. (Section 540.)

Any order for costs, which is given separate and not as part of a decree, may be executed exactly as if it were a money decree. (See sections 218-22.)

SECTION VI.—EXECUTION OF DECREE.

§ 24.—*Method of Execution.*

This is quite a separate business. It is not at all necessary that the Court which passed the decree should execute it. The business of execution of decrees for all or some of the Courts is sometimes entrusted to one Court at head-quarters. But this is a question of the distribution of business belonging to the same district.

Where it is necessary to send a decree to another district, beyond the local jurisdiction of the Court that passed it, this has to be done in the manner prescribed in sections 223-4.

A decree may be transferred and executed by the transferee (sections 232-3.)

A decree may be executed against the representative of a deceased judgment-debtor, but only to the extent of the property which the representative has received and not already *duly* disposed of. (Section 234.)

An application for execution must set forth the particulars specified in section 235.

Decrees are executed by attachment and sale (if necessary) of movable property; by attachment and sale (if necessary) of immovable property; by arrest and civil imprisonment of the debtor.

In certain cases, before the decree is executed, notice is issued to the party against whom execution is applied, requiring him to show cause, if any, against the execution. (Section 248.)

The decree must be executed within one year after its issue, or one year from some previous application or attempt to execute it.

When execution is allowed, a warrant for the execution is issued. (Section 250.)

§ 25.—*Payment into Court.*

Money paid in satisfaction of a decree must be paid into Court, or out of Court, or in any manner specially directed by the Court which passed the decree. (Section 257.) If paid out of Court the receiver must certify the payment to the Court executing, or if he does not the judgment-debtor may inform the Court and get an order to the receiver to show cause why the payment should not be recorded in Court.

If an order is not made, and the payee has not recorded the receipt, payment out of Court will go for nothing.

As a general rule it is always safe and even necessary to pay everything through the Court, because, though it is possible to trust to the payee reporting payment out of Court, or even to bring him up and ask him, still if it is denied and the payer fails to satisfy the Court that an order for recording payment should be made, may lose the benefit of his payment.

§ 26.—*Execution in other Cases.*

The above, of course, refers to cases where the money has to be paid. Where the decree requires delivery of possession of some article, or of house or lands, or something else, there are numerous sections which describe the way in which execution is made in each case. (Sections 259-65.)

§ 27.—*Property which is not liable to attachment.*

Where attachment of movable property is ordered, it should be mentioned that various articles, necessary wearing apparel, tools of artizans, agricultural implements and cattle necessary for husbandry and some other kinds of property, whether actually existing, or what are called by lawyers "choses in action;" *i.e.*, valuable rights, are not attachable. (Section 266.) Pensions are exempt, and so are the pay and allowances of native soldiers, as well as the wages of

domestic servants and labourers. The salary of public and Railway officials, when not exceeding 20 rupees a month, is exempt; if it exceeds 20 rupees a month one-half may be attached.

Debts due to the judgment-debtor are attachable under the conditions of section 268, and so are decrees due to the judgment-debtor. The attachment of such debts, and also of salaries, is made by prohibitory order addressed to the person who has to make the payment.

Attachment of lawfully seizable property is made by actual seizure and deposit in the custody of the proper officer.

The power of actually taking possession is limited by the conditions as to time and place, and breaking open doors, &c., specified in section 271.

§ 28.—*Immovable Property.*

Immovable property is attached by an *order* prohibiting the judgment-debtor from transferring or changing the property in any way, and warning persons from receiving the property by any such transfer. This order is proclaimed by beat of drum on the spot, and a copy is fixed up on some conspicuous part of the property, and also at the Court-house; if it is revenue-paying land, also at the Collector's Court-house. (See section 274.) Any alienation made after such an order is absolutely null and void. (Section 276.)

§ 29.—*Objections to Attachment.*

There often are objections to attachment. Persons come forward and say that the property attached belongs to them, not to the debtor, and ought to be released. This objection may of course be real, or it may be the result of fraud, or a secret transfer made in expectation of the decree and so to avoid attachment. Not only are such fraudulent transfers void, but in some cases are punishable under the Penal Code[9].

The Court executing must make an enquiry in such cases and take evidence, and *may* postpone any sale that has been notified, pending the investigation. If the Court thinks that the property was not recently in possession of the judgment-debtor or as so in

[9] See Chapter XI, sections 206-7.

trust for some other person, and otherwise as set forth in section 280, an order for release *shall* be passed. If not the attachment is upheld, and then the claimant must institute a regular civil suit to establish his right (section 283), otherwise the order is conclusive; there is no appeal or other redress but bringing a regular suit.

It often appears that the property is temporarily attached, but that it is *subject* to some *lien* or *mortgage:* in that case (section 282) the attachment continues, and sale may be made, *but subject* to the lien.

If several Courts attach the same property, see section 285.

§ 30.—*Sale of Attached Property.*

There are specific rules for sale of property, both movable and immovable, sections 286-295, 296-303 and 304-327. But as these concern the Courts, not the forest officer, I do not propose to give any account of them.

It need only be borne in mind that under section 320, local Governments may, with the sanction of the Governor-General in Council, notify that claims in which the sale of immovable property has been ordered, are to be transferred to the Collector, and then a special procedure for making the property available, as far as it will go, to meet all existing decrees against it, and for letting or mortgaging land *instead of selling it,* as well as for managing the land and paying the debts out of the proceeds, is provided.

In some provinces and districts it will also be borne in mind that there are specific restrictions placed on the sale of immovable property, usually some form of report and sanction for houses and lands, and some reference to the highest judicial authority before selling *ancestral* landed property[10].

§ 31.—*Arrest and Imprisonment.*

The debtor arrested in execution of a decree must be taken before the Court, and his imprisonment in the civil jail will be

[10] These are referred to in section 327 of the Code.

ordered. He may be arrested at any time, but there is no permission to enter a house after sunset and before sunrise, nor to break an outer door to effect an entry and make an arrest. (Section 336.) The moment an arrested person pays the decree and costs he must be released.

The decree-holder has to deposit the cost of maintaining the debtor in jail, and if he does not keep up the proper deposit as ordered by the Court, the prisoner will be released on the money (at a certain daily rate) coming to an end.

No person can be imprisoned for more than six months for any debt, or more than six weeks for a debt not exceeding Rs. 50. (Section 342.)

The execution of a warrant for civil imprisonment must be properly endorsed and returned to the Court, like any other warrant. (Section 343).

§ 32.—*Insolvent Debtors.*

A person who really cannot pay need not remain in jail. He has only to apply in writing (and this he can also do if his property, not his person, has been attached) to be 'declared an insolvent,' and the holder of a money-decree may also make the like application against his judgment-debtor.

The procedure in these cases is further described in sections 352-360.

SECTION VII.—ON PROCEEDINGS INCIDENTAL TO A SUIT.

This concludes the subject of a civil original suit, its decree and the mode of executing it. The Code next deals with *incidental* proceedings, of which it will be sufficient to indicate the nature, thus:—

Sections 361—372.—What is to be done when the death, marriage, or insolvency of one of the parties happens.

" 373—375.—How suits may be *withdrawn* and *adjusted.*

" 376—379.—Payment into Court.

" 380—382.—Requiring security for costs in some cases.

" 383—391.—Commissions to examine witnesses.

Sections 392—393.—Commissions for local investigation.
„ 394—395.— Ditto to examine accounts.
„ 396.— Ditto to make partition of immovable property not being revenue-paying land.
„ 397—400.—General provisions regarding Commissions.

On these I only offer a few remarks on points which may occur in suits in which a Forest Officer is concerned.

§ 1.—*Withdrawal and Adjustment or Compromise.*

The plaintiff may apply to the Court to *withdraw* the suit and bring another at a future time. When there is at present some *formal* defect which must cause the suit to fail, or otherwise if there are sufficient grounds as regards the whole suit or part of it, this will be allowed. (Section 373.)

Withdrawal can of course be made without permission, but then the plaintiff is liable to costs, and cannot bring a fresh suit.

There may also be a *compromise* or adjustment, and this when effected will be recorded and a final decree given in accordance with the terms arranged. (Section 375.)

§ 2.—*Commissions.*

I have already spoken of these as issued for the taking down of the evidence of a witness who cannot be produced personally before the Court. It may be that there is a question in a suit, which demands an enquiry on the spot, and the Judge cannot make it; a Commission for *local investigation* may then be issued to any person whom the Court thinks fit. The return to the Commission not only includes a report or description of the locality with any plans or survey that may be needed, but also the written depositions of witnesses examined on the spot. (Section 392.)

In the same way where an examination or adjustment of lengthy accounts is necessary, a Commission may be appointed to examine and report, and may, according to instructions furnished, either simply report results, transmitting his proceedings, or give an opinion on a point or points referred.

In all cases the Court may order any reasonable sum for the expenses of the Commission, to be paid into Court by the party at whose instance, or for whose benefit, the Commission is issued.

All the provisions of the Code regarding the summoning of witnesses and production of documents, apply to the attendance of witnesses and the production of documents before a Commission. Where parties interested neglect to appear before the Commissioner he may proceed *ex parte*. (Section 400.)

§ 3.—*Suits in Special Cases—Pauper Suits.*

Where a person cannot afford to pay the stamp (Court-fee) for a plaint, he may apply to sue "in formâ pauperis." Certain kinds of suits cannot be so brought. (Section 402.)

SECTION VIII.—GOVERNMENT SUITS.

§ 1.—*Suits against Government or Public Officers.*

I have already explained that forest officers are by law protected against a civil suit for anything done by them in their official capacity under the Forest Act[1]. This would protect them both in their personal character (according to the usual principle that public officers cannot be rendered privately liable for official acts), as also in their official character.

But apart from such special protection, it is obvious that claims of a public nature may be either against the Government as a body (as for example, where a person claims to be proprietor of an area of land, which Government also claims), or it may be against some officer of Government in his public capacity for doing, or for refusing to do, some official act. The special rules of procedure in such cases are found in Chapter XXVII of the Code (section 416 *et seq.*), and with this the Forest Officer will do well to be familiar in somewhat more detail than with the rest of the Act.

[1] In some places where the Act is not in force there may be some legal question on this matter. But it is not necessary to go into detail here. Special advice will have to be taken in such cases.

By the "Act for the better government of India" (1858), the "Secretary of State for India in Council" may sue and be sued as representing Government. And consequently all suits brought by or against Government are to be brought in this name, and there is no occasion to enter any further name, description, or place of abode. (Section 418.)

§ 2.—*Summons how served against Government.*

If there is a Government Pleader in any Court, he is the agent of Government for receiving processes against Government. Where there is not, the Deputy Commissioner or the Collector is the representative or agent of the Secretary of State.

When Government is thus sued, the summons to answer *must allow such* time as may be necessary to admit of the usual reference through the proper official channels, and the issue of the necessary orders in the case: the Court has discretion to extend this time. (Section 420.) The Government Pleader or Advocate, or whoever it is that appears, ought to be accompanied by some person able to answer any material question relating to the suit: or if not, the Court has power to require the attendance of such person. (Section 421.)

§ 3.—*Against a Public Officer.*

Where the suit is against a public officer[2], and the defendant desires to make a reference to Government before answering, he may apply to the Court to allow him time to get orders. (Section 423.)

§ 4.—*Preliminary Notice.*

If a suit against Government or against a public officer lies at all, under no circumstances can it be brought without giving two

[2] This term is specially defined in the beginning of the Code. Forest Officers are public officers within this definition, and so are almost every conceivable kind of Civil and Military (Commissioned) Officers, Judicial, Police, Revenue, Excise, Customs, or other departmental subordinates. It will be instructive to the student to compare this definition with that in the Penal Code (section 21); he will find them identical except that Nos. 5 and 6, (jurymen, assessors and arbitrators) are left out; but it would seem that an arbitrator is a public officer as he comes under one of the other clauses.

months' previous notice in writing. If the suit is against Government the notice is addressed to the Secretary to Government, or the Collector of the district. If the suit is against a public officer the notice is given to him (to be delivered personally or left at his office). The notice in writing must state the name and address of the intending plaintiff and the cause of action. And every plaint filed must set forth that this required notice has been duly sent. (Section 424.)

In the case of a public officer, Government will usually undertake the defence (unless clearly the officer has acted arbitrarily or in bad faith, or in some way made himself liable, so that there is no reason why Government should undertake the defence).

The Government Pleader (which by definition includes any officer appointed to the duty, where there is no permanent Government Pleader) is furnished with authority to appear and answer the plaint, and he will apply to the Court which thereon will note his authority to appear, in the register. (Section 426.)

If the Government pleader does not apply under Section 426, the suit will go on like a private suit, except that the defendant is not liable to arrest, nor his property to attachment otherwise than in execution of a decree. (Section 427.) The Court is also bound to exempt the defendant from personal appearance, if he satisfies the Court that he cannot be absent from his duty without detriment to the public service.

§ 5.—*Decree against Government.*

All decrees given against Government or a public officer regarding a public act, must contain an order that the decree shall be satisfied in a certain time. If it is not so, the Court reports the case for the order of the local Government. Execution is not to issue on any decree unless it remains unsatisfied for the period of three months computed from the date of such report. (Section 429).

§ 6.—*Provincial Rules about Government Suits.*

In every province it will be found that circular orders have been issued regarding Government suits, which will require careful atten-

tion, and which should always be found in every divisional forest office. These rules cannot be here reproduced, but they generally direct officers what to do on receiving any notice under section 424, how to prepare and report the facts of the case with their opinion on it, and how to deal with documents which will have to be produced. Instructions are also given for communication with the Government legal advisers and so forth. It will be borne in mind that except in cases claiming land or other property, and in cases on contracts, there will be but few instances in which Forest Officers are likely to have to bring suits.

I shall not pursue the subjects contained in Chapters XXVIII, XXIX, XXX, XXXI, XXXII and XXXIII, except so far as to say that Chapter XXIX refers to suits by or against Companies or Corporations, and if a suit is brought by Government against such, the Chapter itself must be referred to. The chief point is, who is the proper person to serve with the summons on behalf of the Company.

SECTION IX.—PROVISIONAL REMEDIES.

§ 1.—*Security or Attachment before Judgment.*

It may happen in the course of a suit that the defendant, finding his case hopeless, may abscond or prepare to abscond, or may dispose of or remove out of the jurisdiction, any property that he has, so as to make it difficult or impossible for the plaintiff to execute any decree he may get. There is then provision made (section 478 *et seq.*) for calling on the defendant to deposit in Court "money or other property sufficient to answer the claim against him," or to find *security* for his *appearance* of the defendant during the pendency of the suit *and* until "execution or satisfaction of any decree that may be passed against him in the suit."

Another process having a similar object is the *attachment* of *property:* here the application may be to take *security* for the *satisfaction* of any decree, and failing that to attach property within the Court's jurisdiction. (Section 483.)

The attachment is ordered in failure of defendant to show cause against it, and failing to find security.

§ 2.—*Injunction.*

Another provisional remedy while a suit is going on, is the issue of an *injunction* to prevent waste, damage, or alienation of property in dispute, or to prevent the movement or disposal of property generally, to defraud creditors. (Section 492.)

And so if the suit is to restrain defendant from committing a breach of contract or other injury, there may be an *ad interim* injunction to prevent the breach or injury during the suit. (Section 493.)

SECTION X.—SPECIAL CIVIL PROCEEDINGS.

§ 1.—*Reference to Arbitration.*

A brief notice regarding *arbitration* may be useful. First as to arbitration after a suit has been brought. At any time before judgment *all* the parties may agree to refer the case to arbitration and may apply to the Court for an order of reference. The application must be in writing, and will state the particular matter to be referred. The parties will nominate arbitrators unless they specially request the Court to do so for them.

The Court then makes an order, specifying the matter referred and the time for the delivery of the award. (Section 508.)

If more than one arbitrator is appointed provision must be made for the case of a difference of opinion among them, as provided in section 509.

The details of what is to be done if an arbitrator dies, if they fail to appoint an umpire, &c., may be learned from sections 510-12.

The Court may direct witnesses, &c., to attend before the arbitrator, just as it might before itself. (Section 513.)

The award must be signed by those who made it and filed in Court with any depositions that may have been recorded or documents produced.

The circumstances under which alone an award can be set aside, are explained in section 520.

If an award is not set aside on these grounds, and is made in due time, the judgment and decree must follow the award, and there is no appeal. (Section 522).

It is of course always open to parties to agree privately to arbitration, and the award of private arbitrators will be binding on them as a rule; at any rate, the agreement to submit to arbitration is valid like any other contract, and damages may be claimed for its breach.

To facilitate friendly disposal of disputes, the Code has made provision that *without* their bringing any suit in Court, persons having agreed to arbitration in any matter, may go to Court and ask that *their agreement may be filed.* This being done after hearing the parties, the Court orders the matter specified to be referred, and then all the preceding provisions relating to arbitration will apply. (Sections 523-4.)

A still further process is contemplated, namely, when a private arbitration has been concluded, either party may apply to have the *award* filed in Court, and this, after hearing both parties, may be ordered; but the award can be remitted under section 520, or set aside for corruption, &c., under section 521; otherwise it is treated as an award made by Court arbitration, and decree, &c., follows.

Analogous to the proceedings in arbitration just described, is the case where two parties agree to state some definite question of law or fact in which they claim to be interested and get the finding of a Court on this question: but mere abstract questions of law or fact, in which the parties might desire an opinion, are not referable in this way, because in any agreement under this section (section 527), the agreement must provide that upon the finding of the Court a certain sum of money shall be paid by one party to the other, or some property shall be delivered, or one or other of them shall do or refrain from doing, some particular act specified in the agreement.

The Court must be satisfied that the interest is *bonâ fide*, and otherwise as stated in section 531. The agreement must also bear the Court-fee stamp for a suit of the nature in question. The Court may give a decree on this "special case" as it might in a regular suit.

SECTION XI.—APPEALS.

§ 1.—*When an Appeal lies.*

The remaining subject to be noticed is that of Appeals.

The result of all civil proceedings is either a *decree* in a suit (allowing the claim and costs or part of the claim, or costs only, or dismissing a claim with or without an order for some one to pay certain costs), or else it is an *order* in some proceeding not being a suit.

All *decrees* (not being Small Cause Court judgments) are appealable at least to one Court. The term "decree" is defined in the Code so that it can always be ascertained whether the judgment objected to is a "decree" or only an an "order."

No *orders* are appealable except those set out in 29 clauses under section 588.

Where there has been one appeal there may be a second appeal to the High Court on the ground of an error in law, or important error in procedure affecting the decision of the case on the merits. The terms of section 584 must, however, be exactly looked to. Generally, also, no second appeal lies in cases of such a kind that they would be cognizable by a Small Cause Court, the amount or value of the subject-matter of the original suit not exceeding Rs. 500. It must, however, be remembered that there may be local rules in other laws allowing a second appeal in such cases, for example in the Panjab. (Act XVII of 1877, sections 38-9)[3].

Lastly there is, in cases of the value of Rs. 10,000 and upwards (the amount being in dispute in *appeal*) a final appeal to the Queen in (Council heard by the Privy Council.) But if the decree

[3] These sections practically allow three appeals in one case.

appealed from affirms the decree in the Court below (two Courts agree *i.e.*, in passing the decree), there cannot be such an appeal except on "some substantial question of law" being involved.

The procedure for applying to appeal to the Privy Council, is laid down in Sections 598 *et seq.*

§ 2.—*Procedure in Appeals.*

An appeal is presented in the form of a written "memorandum" with a copy of the decree and of the judgment (unless the Court expressly dispenses with it).

The memorandum is to consist of numbered paragraphs, setting forth concisely and under distinct heads, the grounds of objection.

The appellant cannot without leave take up other grounds than those in his memorandum, but the Court itself may consider the case from any point of view and on any ground. (Provided that the other side (the respondent) has had an opportunity of contesting the case on those grounds.) (Section 542.)

If the case is clear, the Court may confirm the judgment without giving notice to the other party, and with or without first sending for the record of the case. (Section 551.)

Notice of the day for hearing (when the procedure under section 551 is not followed) is given by notice stuck up in the Court-house. A copy is also sent to the Lower Court to be served on the respondent.

If the appellant does not attend, (after a day has been fixed and the respondent called) the appeal will be dismissed (*only that this is compulsory*) for default, but may be re-admitted for cause shown. (Sections 556-8.) If the respondent does not appear, the case will be heard *ex parte*. An *ex parte* decision may, however, be set aside for cause shown under section 560. It may be that the respondent, though he has not filed a cross-appeal,—that is, an appeal on *his* side, may object to the decree in part or wholly; if he has given seven days' notice[4] before the date of hearing, he may take any

[4] The contents of the notice are to be a statement of the objections he has, just as in a memorandum of appeal.

objection that he likes to the decree besides answering appellant's objections. (Section 561.)

§ 3.—*What Orders are passed on appeal.*

In appeal, one of three things will happen—

(1) The Court will set aside the decree and order a new trial or decision (Section 562.)

(2) The Court will at once pass judgment, confirming, modifying or reversing the Lower Court's order.

(3) The Court will (section 566) remand the case for additional information on some specific issue, in which case the record comes back (with the finding, evidence, &c.) to the Appellate Court, which then passes a final order.

In the first case, it will be found that the Lower Court has decided the suit on some preliminary point, which has precluded it from going into the case on its merits, or at least from hearing some evidence of fact which appears essential to the determination of the rights of the parties. If this point is found against the Lower Court by the Appellate Court, naturally the case will be remanded for hearing on the merits, either generally or on some specific issue, or to take evidence on the point excluded. (Section 562.) This is the only case in which the entire case can be remitted to the Lower Court for a new decision.

In the third case the Appellate Court may send to the Lower Court to take evidence on certain issues, and to take additional evidence thereon, and return the finding and record of evidence to the Appellate Court. (Section 566).

§ 4.—*New Evidence on Appeal.*

Otherwise neither party is at liberty to produce any further evidence on appeal: but the Court may allow, on its own motion, any document to be produced, or witness to be examined, on recording its reasons. (Section 568.) In all cases this additional evidence must be on specific points to be stated. (Section 570.)

§ 5.—*Reviews.*

A *review* of judgment by the Court originally pronouncing it, if no appeal is allowed, or none has been preferred, may be applied for; but only on the ground of the discovery (*a*) of "new and important matter or evidence, which, after the exercise of due diligence was not within his knowledge or could not be produced" by the applicant at the time of the decree or order[5]; or (*b*) on account of some mistake or error apparent on the face of the record; or (*c*) for any other sufficient reason. (Section 623.)

The review must, *except* in case of either of the reasons (*a*) or (*b*), be made to the same *Judge* who gave the judgment. This does not apply to a High Court. (Section 624.)

If the review is granted (for reasons to be recorded), notice must be given to the other party to be heard against the review.

There is no review of a review, nor a review of an order on application to review. (Section 629).

§ 6.—*Miscellaneous.*

At the end of the Code are a few miscellaneous provisions regarding the appearance of women in Court, the exemption of certain persons of rank from personal appearance, and the language of Courts, &c. For this, if necessary, the Code may be referred to. (Section 640 to end.)

[5] And there must be "strict proof" of this allegation. (Section 626.)

Note on the Court Fees Act (Act VII of 1870).

All the documents used in a suit or appeal, and a list of which is given in Schedule I appended to the Court Fees Act, require the *ad valorem* fees; and all those (chiefly applications and petitions) in Schedule II require the *fixed* fees, therein specified.

No document of the kind can be filed, exhibited or recorded without the proper fee-stamp.

Section 7 must be looked to see how to calculate the value of stamp for *plaints* of different kinds, and section 8 for *appeals*. Applications and petitions to Court not being plaints or appeals require fixed fees as shown in Schedule II. For example, application for copies can be given on one anna fee. First applications for witnesses to be summoned are free. Applications in petty cases under Rs. 50 value are on one anna. In other cases the fee is eight annas.

Certain documents mentioned in section 19 are exempt from fees. These are not likely to come under a Forest Officer's notice, except indeed that any application for money due by Government, and any application to cut timber in Government forests or otherwise relating to such forests," are exempt[6].

Besides the fees paid by means of stamps on plaints and petitions, fees are also levied for the service of process summons, &c., (*talabána*). Such fees are levied according to rules made by the High Court, confirmed by the local Government and sanctioned by the Governor-General in Council. (Section 20.)

All fees, either on plaints, appeals, applications, copies, decrees statements, or for service of process, are levied by stamps (section 25), which may be impressed or adhesive, or partly one and partly the other, as may be directed by the Governor-General in Council by Notification in *Gazette of India*.

Adhesive labels are now used, and must not be confused with stamps under Act I of 1879, for the one will not serve the purpose of the other. A person writing a plaint on a non-judicial stamp,

[6] Though why such should be mentioned at all in a *Court* Fees Act, I do not know.

for example, would not be held to have paid the fee; he would have to get a Court fee stamp, and his other stamp would go for nothing (unless indeed under the provisions of Act I, he could recover it as an accidentally spoiled stamp).

These fees, or such of them as may be allowed, form (together with pleaders' fees and other expenses) costs in the suits.

Government suits are not in any way exempt from Court fees of any kind.

THE END.

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